DOCUMENT RESUME

ED 197 705 IR 009 084

AUTHOR Miller, Jerome K., Ed.
TITLE Copyright and the Teaching/Learning Process. Issues Analyzed at the Critical Issues Conference 4 (Washington, DC, March 21-23, 1977).
INSTITUTION Information Futures, Pullman, Wash.
PUB DATE Mar 77
NOTE 90p.

EDRS PRICE MF01/PC04 Plus Postage.
DESCRIPTORS Audiovisual Aids: Broadcast Industry: *Copyrights: Ethics: Federal Regulation: *Guidelines: History: *Legal Responsibility: Programing (Broadcast): Publications
IDENTIFIERS *Copyright Law 1976: *Fair Use

ABSTRACT

The nine papers in this collection discuss the educational issues raised by the 1976 Copyright Revision Act with special emphasis on conflicts between the rights of teachers and learners and the rights of creators. Topics covered include: (1) the history of copyright development in Europe and America, (2) the educational implications of the new copyright law, (3) questions and answers concerning the educational use of broadcast programming, (4) educational interpretations of the new copyright law, (5) considerations in determining fair use of copyrighted works, (6) changes in licensing and permission processes, (7) proposed guidelines for off-air-copying of commercial television programs, and (8) professional ethical considerations raised by the new copyright law. A brief bibliography of items reporting, interpreting, and discussing the 1976 Copyright Revision Act is included. (BK)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED197705

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

COPYRIGHT AND THE TEACHING/LEARNING PROCESS

Issues Analyzed at the
Critical Issues Conference 4
Washington, DC, March 21-23, 1977

Jerome K. Miller, Editor
University of Illinois at Urbana-Champaign

© INFORMATION FUTURES
2217 College Station
Pullman, Washington 99163

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Gerald R. Brong

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

IR009084

Dedicated to the memory of

a good friend and colleague

CHARLES W. WRIGHT

PLANNING AND EDITORIAL COMMITTEE:

Gerald R. Brong, Washington State University

John A. Davis, Washington State University

Charles W. Vlcek, Central Washington State College

No part of this set of papers may be reproduced by any means without the permission of INFORMATION FUTURES and the author(s) of the specific paper in question.

A basic purpose of INFORMATION FUTURES is to facilitate the analysis of critical issues through a confrontation with ideas. It is through the use of the following papers that issues related to copyright and the processes of teaching and the activities related to learning will be examined. INFORMATION FUTURES is interested in making available the content of the following papers so as to facilitate the examination of the issues in question.

To request permission to reproduce any portion of the following papers please contact INFORMATION FUTURES-

CONFERENCE SCHEDULE

March 21-23, 1977
DuPont Plaza Hotel
Washington, DC

FIRST EVENING

7-10:30 p.m.	Registration and informal reception; a time to meet the speaker/consultants

FIRST DAY

7:45 a.m.	Registration
8:45 a.m.	Welcome and orientation
9:00 a.m.	First general session
	A Historical Review of Copyright by Jerome K. Miller
	A Detailed Look at the New Law by Eugene N. Aleinikoff
10:30 a.m.	Refreshments
10:45 a.m.	Second general session
	Publishers' and Producers' Interpretations of the Law by Ivan R. Bender
12:30 p.m.	Lunch
2:00 p.m.	Third general session
	Commercial TV Interpretation of the Law by James L. Popham
	Public TV Interpretation of the Law by Eugene N. Aleinikoff
3:30 p.m.	Refreshments
3:45 p.m.	Fourth general session
	Educators' Reaction to the Law by Harold E. Wigren
6-7:00 p.m.	Hosted reception

SECOND DAY

8:45 a.m. Fifth general session

Is Licensing a Solution?

An Overview of Licenses and Permissions by Jerome K. Miller

Publishers' and Producers' Viewpoint by Ivan R. Bender

Commercial Television Viewpoint by James J. Popham

Public Television Viewpoint by Eugene N. Aleinikoff

Educators' Reaction by Harold E. Wigren

10:00 a.m. Refreshments

10:15 a.m. Sixth general session

Identifying Cleared Materials and Obtaining Clearance to Copy Materials for Educational Use

Publishers' and Producers' Viewpoint by Ivan R. Bender

Commercial Television Viewpoint by James J. Popham

Public Television Viewpoint by Eugene N. Aleinikoff

Educators' Reaction by Harold E. Wigren

12:30 p.m. Lunch

Copyright and Professional Ethics by John A. Davis

1:45 p.m. Seventh general session

Open forum

3:30 p.m. Adjournment

SPEAKER/CONSULTANTS

EUGENE N. ALEINIKOFF Copyright Attorney 1 Dag Hammarskjold Plaza New York, NY 10017	Formerly Legal Counsel to the Public Broadcasting Service; teaches copyright law at Rutgers Law School; recognized as person most knowledgeable about the Copyright Law and its interpretation.
IVAN R. BENDER Encyclopaedia Britannica Educational Corp. 425 North Michigan Avenue Chicago, IL 60611	Assistant Secretary and Legal Counsel to Encyclopaedia Britannica; Secretary and Legal Counsel, Association of Media Producers (AMP); Chairman, Copyright Committee, AMP.
GERALD R. BRONG Assistant Director AV Instructional Media Services Washington State University Pullman, WA 99163	President, INFORMATION FUTURES; Senior Author for PROJECT: MEDIA BASE; former Director of Library Futures Planning Task Force for Washington State; consultant in Library/information service.
JOHN A. DAVIS Director AV Instructional Media Services Washington State University Pullman, WA 99163	Conference Registrar, INFORMATION FUTURES; Past-chairman, Professional Ethics Committee, Association for Educational Communications and Technology.
JEROME K. MILLER Graduate School of Library Science University of Illinois Urbana, IL 61801	Chairman, Copyright Committee, Association for Educational Communications and Technology; author of the award-winning "Copyright Today" column in *Audiovisual Instruction;* INFORMATION FUTURES associate.
JAMES J. POPHAM National Association of Broadcasters 1771 N Street N.W. Washington, DC 20036	Assistant General Counsel, National Association of Broadcasters (NAB); member of the American Bar Association and Federal Communications Bar Association.
CHARLES W. VLCEK Director and Professor of Instructional Media Central Washington State College Ellensburg, WA 98926	Conference Coordinator, INFORMATION FUTURES; Past-President, Division of Telecommunication and Technology, Association for Educational Communications and Technology.
HAROLD E. WIGREN Educational Telecommunications Consultant National Education Association 1201 16th Street NW Washington, DC 20036	Chairman, Ad Hoc Committee on Copyright Law Revision, 1963-1975; Consultant to National Education Association for satellite communications, cable television, public broadcasting, and other technologies; NEA's representative and spokesperson to the U.S. Congress on revision of the Copyright Law; member of the negotiating committee between the educational community and publishers/author groups formulating guidelines for educational use of copyrighted materials.

PARTICIPANTS IN COPYRIGHT AND THE TEACHING/LEARNING PROCESS

The participants in the Critical Issues Conference 4, March 21-23, 1977, in Washington, D.C. came from colleges and universities, school districts, state government and federal government agencies, and the publishers and producers of teaching/learning resources.

Total participation in CIC-4 amounted to 43 educational technologists and library/information-service specialists from all corners of the United States. The geographic breakdown was as follows:

Geographic Distribution	Participants	Consultants	Total
Northeast--New York (2), Connecticut (1)	3	1	4
Mid-Atlantic--Washington, DC (3), Pennsulvania (3), New Jersey (3), Maryland (1), Virginia (3)	13	2	15
Southeast--Florida (1), North CArolina (2), South Carolina (1)	4		4
South--Tennessee (1), Alabama (2), Texas (1)	4		4
Midwest--Illinois (2), Michigan (3), Minnesota (1), Wisconsin (1)	7	1	8
Southwest--Arizona (2), New Mexico (1), California (2)	5		5
Northwest		3	
Number of states - 20	36	7	43

Following is a listing of the specific institutions or agencies represented at CIC-4:

Higher Education (excluding speaker/consultants)

Arizona State University
Chaffey College (California)
California State University (Fullerton)
Gallaudet College (DC)
Harper College (Illinois)
Maxwell AFB: Air University
University of Maryland
Central Michigan University
Ferris State College
Southwest State University (Minnesota)
St. Clair County Community College (Minnesota)
Central Piedmont Community College (North Carolina)
Wake Technical Institute (North Carolina)
College of Santa Fe
Middlesex County Community College (New Jersey)

Montclair State College (New Jersey)
Ocean County Community College (New Jersey)
SUC, Buffalo
Pennsylvania State University
University of Pittsburgh
Columbia Bible College (South Carolina)
University of Tennessee
Virginia Polytechnic
University of Wisconsin, Green Bay

School Districts

Fairfield, Connecticut
Orange County, Florida
McAllen Intermediate School District, Texas
Lincoln I.V., Pennsylvania
Alexandria, Virginia

Producers and Publishers

Science Research Associates
Time-Life Films

Agencies

Arizona Department of Libraries
Wisconsin Superintendent of Public Instruction
N.I.E.
P.B.S.

Throughout 1977-79 INFORMATION FUTURES anticipates a variety of special purpose conferences examining the implications of the new copyright law as it relates to the teaching/learning process. These specialized conferences will be both national and regional in scope. It is the hope of INFORMATION FUTURES that through these conferences the supportive impact of the new copyright law will be maximized.

PREFACE

COPYRIGHT PROCEEDINGS

The act of creating an intellectual product is one of the highest level accomplishments pursued by humankind. Creative acts resulting in intellectual products become complicated when we consider the creator's rights for protecting the item created. It is assumed that the creator has an inherent right to his creation--it is through the protection of this right that further creations will flow forth.

All of human experience results in learning and learning is the basis of all activity in all societies. It is through this learning that society is perpetuated.

The creations of others can be used to facilitate learning. It is through experiencing these creations that we will receive a transfer of ideas from others--as we use the creations of others we learn. Learners have rights that must be protected just as creators have rights. We are seeking equal rights to facilitate the teaching-learning process and the unique human activity of creation.

When the rights of learners, and the rights of teachers, come into conflict with the rights of creators a confrontation occurs. At the point of this confrontation critical issues related to copyright and the teaching-learning process become evident.

The Critical Issues Conference 4, on *Copyright and the Teaching/Learning Process*, is the analysis, through confrontation, of the rights of creators and the rights of learners. The proceedings and working papers contained in this publication provide an overview of the confrontation as these critical issues were examined. CIC-4 raised many questions and provided many answers. It is evident that not all questions have been raised nor have all answers been provided. It is essential that the examination of critical issues continue.

It is hoped that through an analysis of the issues identified at CIC-4 the rights of creators and the rights of learners will be better understood and therefore facilitated. It is also hoped that through the

x

confrontation, analyzed in the following papers, our understandings of the interrelationships of these rights will be enhanced. Because of our understandings we will further our creative capabilities and maximize our utilization of existing resources to facilitate the core activity in society--learning.

INFORMATION FUTURES
2217-College Station
Pullman, Washington 99163

June, 1977

TABLE OF CONTENTS

	Page
CONFERENCE SCHEDULE	iv
SPEAKER/CONSULTANTS	vi
PARTICIPANTS IN COPYRIGHT AND THE TEACHING/LEARNING PROCESS	vii
PREFACE	ix
A BRIEF HISTORY OF COPYRIGHT Jerome K. Miller	1
EDUCATIONAL IMPLICATIONS OF THE NEW COPYRIGHT LAW Eugene N. Aleinikoff	4
COPYRIGHT Q & A No. 5, EDUCATIONAL USE OF BROADCAST PROGRAMMING UNDER THE 1976 COPYRIGHT REVISION ACT National Association of Broadcasters	11
AN EDUCATOR'S INTERPRETATION OF THE NEW COPYRIGHT LAW, 1977 Harold E. Wigren	18
QUESTIONS TO BE CONSIDERED IN DETERMINING IF A GIVEN USE OF A WORK IS PROBABLY A FAIR USE National Education Association	35
LICENSES AND PERMISSIONS Jerome K. Miller	46
PROPOSED GUIDELINES FOR OFF-AIR-COPYING OF COMMERCIAL TELEVISION PROGRAMS Participants of *Copyright and the Teaching/Learning Process* Conference	52
COPYRIGHT AND PROFESSIONAL ETHICS John A. Davis	55
CONFERENCE SUMMARY Jerome K. Miller	61
A BRIEF BIBLIOGRAPHY Jerome K. Miller	74

A BRIEF HISTORY OF COPYRIGHT

by

Jerome K. Miller
Graduate School of Librarianship
University of Illinois
Champaign-Urbana, Illinois

and

Associate of INFORMATION FUTURES

A BRIEF HISTORY OF COPYRIGHT

Jerome K. Miller

Copyright protection for authors and printers began in Italy in the fifteenth century. At that time, copyrights, patents, manufacturing, and trade monopolies were known as patents or privileges. They were granted by a monarch or municipal body in response to a request by an author, printer, inventor, manufacturer, or merchant. It was probably not until the reign of England's Queen Mary Tudor that copyrights began to be clearly delineated from the other forms. Mary Tudor and her father, Henry VIII, experienced considerable difficulty in controlling the press. This was a period of political and religious turmoil and the Crown was anxious to suppress opinions contrary to its own. Mary Tudor solved the censorship problem in 1557 by granting a charter for printing to the Stationers' Company. The company was an association of printers. In return for the monopoly on print, they agreed not to print anything contrary to the monarch's religious and political views. The charter regulations gave printers a perpetual monopoly on the works they printed. One printer could sue another printer for infringing his "copy right" in a particular title. The Stationers' Company charter expired in 1695, terminating all the printers' monopolies. It was replaced by the Statute of Anne of 1710.

The Statute of Anne established most of the basic concepts of modern statutory copyright. It granted copyright protection to the authors, not to the printers. At present, most copyrights are registered in the publisher's name; they are based, however, in the author's exclusive rights. Under the Stationers' Company charter, the printers held perpetual monopolies on their publications. The Statute of Anne limited the monopoly to fourteen years. If the author was still living at the end of the term, the monopoly was extended for another fourteen years. The Statute required that all books and pamphlets be recorded, prior to publication, in the registers of the Stationers' Company. This was a hold-over from the old Stationers' Company charter. It is the basis of our modern system of copyright registration. The Statute required that copies of each title

INFORMATION FUTURES
1977

be deposited in nine major British libraries. This deposit requirement provides a record of publication, and it guarantees the excellence of the major research library holdings. The United States now has only one depository library, the Library of Congress. The Statute also established orderly procedures for prosecuting and penalizing copyright infringers.

The Statute of Anne applied to the English Colonies of North America. After the American Revolution, twelve of the thirteen states passed their own copyright laws. This proved to be an unworkable arrangement, so the authority to regulate copyrights was largely invested in the federal government. The first U.S. copyright law was passed in 1790. It was based on the Statute of Anne, with some parts taken from the state copyright laws. The U.S. copyright laws have undergone four complete revisions and about sixty-five amendments. The changes can be roughly divided into three groups: (1) improvements in the rights of the copyright owner, (2) confirmation of the user's rights in copyrighted materials, and (3) revision of the regulatory processes.

Copyright duration (the period of protection) has been extended several times to reach the new provision of the life of the author, plus fifty years. Copyright protection has been expanded to include maps, charts, prints, lectures, sermons, drama, sheet music, statuary, photographs, labels, motion picture films, and sound recordings. The Register of Copyrights has included computer programs and video recordings. The user's rights to certain uses of copyrighted materials (fair use) were established by the courts in the nineteenth and twentieth centuries. They were given the force of law in the latest revision. The regulatory processes have undergone numerous changes. The rules for registration and deposit were changed frequently during the nineteenth century. Twentieth century revisions have centered on licenses. The 1909 law established compulsory licenses for sound recordings. The manufacturers of sound recordings were compelled to pay a fixed fee for each recording they produced. When a composer permitted one company to record a work, then all of the other firms had an equal right to record and sell it. The 1976 amendment includes compulsory licenses for jukeboxes, cable television, and educational broadcasting stations.

EDUCATIONAL IMPLICATIONS OF THE NEW COPYRIGHT LAW

by

Eugene K. Aleinikoff
Attorney
1 Daghammarskjold Plaza
New York, New York

EDUCATIONAL IMPLICATIONS OF THE NEW COPYRIGHT LAW

Eugene N. Aleinikoff

Past Copyright Law

Fair Use

Customary non-statutory permission to make limited use of copyrighted works for critical, analytical, and similar purposes. "Fair use" has been historically defined in general terms, and is usually limited to brief quotations of short excerpts from books or other print materials.

Fair use historically developed in commercial publishing context and had little significance in educational circles. A single case, *Wihtol v. Crow* (1962), held under special circumstances that a new choir arrangement of a copyrighted hymn made by an Iowa teacher could not be considered fair use since it was used in entirety and reproduced in multiple parts.

Fair use recently assumed major educational importance in the case of *Williams & Wilkins v. the U.S.* (1973). It was the first and only major judicial discussion of full-length photocopying. The *Williams & Wilkins* case was narrowly decided by the U.S. Court of Claims and approved only by a 4-4 divided vote in U.S. Supreme Court. It held that Xerox copies of professional articles in medical journals, made on a large scale by the National Library of Medicine for intra-institution reference and inter-library loan purposes, are permissible under the fair use doctrine. While the Williams & Wilkins discussion was carefully restricted to the exact facts and expressly subject to pending Copyright Law amendment, it has been cited to provide positive justification for considerable educational photocopying under fair use privileges.

Not-for-Profit Public Performance

Special statutory provisions limiting copyright protection for musical and literary works to "public performance for profit." This so-called "not-for-profit" exemption is restricted to non-dramatic literary and musical works. It has been argued by authors and publishers that it

does not apply to copies or recordings, but only to "live" performances and broadcasts.

Judicial interpretation of "public" has excluded private clubs not open to the general public on an admission-paying basis, so the term seems inapplicable to classroom use, although no actual court decision has been made to that effect in the past.

"Performance" has had different meanings at different times. While clearly including radio and television station broadcasts, Supreme Court decisions in the 1970s in *Fortnightly v. United Artists Television* (1968) and *Columbia Broadcasting System v. Teleprompter* (1965) held that CATV relays of local and distant broadcast signals are not supplemental performances and hence do not require additional copyright payment unless they are also recorded for delayed cable transmission.

"For profit" was initially defined in *Associated Music Publishers v. Debs Memorial Fund* (1944) as applicable to non-sponsored radio programs on commercial stations operated by tax-exempt foundations which also carried sponsored programs, on the ground that the commercial aspects invoked an overall "for profit" determination. But the *Debs* case has been argued by public broadcasting authorities to be inapplicable to non-commercial public stations under special FCC authorization. Authors and publishers have responded that "underwritten" public television and radio programs are no different from "sponsored" commercial programs, and hence should be considered "for profit" for copyright purposes.

The New Copyright Law

Fair Use

Section 107 defines "fair use" as use of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship and research." It indicates that the four main factors to be considered are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

Since this statutory language is still fairly general, the Ad Hoc Educational Copyright Committee worked out more detailed instructional standards in an "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions" plus a similar agreement on "Guidelines for Educational Uses of Music." Not all educational authorities have agreed with either set of guidelines, but the negotiators have pointed out that they permit the "minimum and not the maximum standards of educational fair use" under the new law.

There is no similar guidance on the proper scope of fair use of copyrighted materials in educational television or radio programs. Congress specifically asked that appropriate educational organizations meet with broadcasters and film producers to work out, if possible, similar fair-use guidelines for off-air recording of commercial and public broadcasting programs. In the meantime, the extent of fair use of broadcast programs is in much doubt, and would seem prohibited for off-air recordings of entire television or radio programs--or even substantial portions--especially if used repeatedly for teaching purposes.

There is added protection for educators in Section 504 precluding statutory damages against any teacher or librarian, or against any public television or radio producer or station, by reason of copyright infringement which was reasonably believed to be "fair use" at the time. This should assist in reducing concerns of school boards and station managements about possible copyright violations by classroom teachers and television producers--but may not be of much comfort for educational off-air recordings.

Library Photocopying

Under Section 108, libraries and archives are authorized to make photocopies of magazine articles and book excerpts--and even of complete works--so long as on a single-copy basis and neither part of a multiple-copying effort nor otherwise "systematic" in nature. Standard inter-library loan copying is not to be considered "systematic" if not in such quantities as to substitute for magazine subscriptions or book purchases. General guidelines were developed at the last minute in the Congressional proceedings, and have been informally accepted by the principal library, publisher, and author organizations.

More important in the audiovisual area, Section 108 includes an exemption for off-air recording by a library or archives of television and radio newscasts, news interviews and on-the-spot news coverage, and for the distribution of a "limited number of copies and excerpts" of such news recordings on a non-commercial loan basis for study and research purposes.

Classroom Performance

Although the "not-for-profit" exemption is no longer included in the new law, Section 110(1) generally permits free use of copyrighted works as desired "in the course of face-to-face teaching activities" in a classroom, excluding only known-pirated films. While copying is not specifically authorized, it seems probable that transparencies or other display mechanisms would not be precluded. Closed-circuit systems might well also come within this exemption so long as within a single school or institution.

Instructional Television

Section 110(2) permits inclusion of literary, musical, pictorial, and similar non-dramatic published works in ITV programs without clearance, if the program broadcast is part of the school curriculum and the copyright use is directly related to teaching content. By virtue of Section 112(b), however, no more than thirty copies of any kind may be made or authorized and all copies of every kind must be destroyed within seven years, or else the exemption will be lost. ITV programs can be aimed at an at-home audience as well as school viewers, so long as credit-instruction primarily is involved.

Commercial Records

Commercial records, under Section 114, are now completely available for educational television and radio programs, whether ITV or public broadcast, without permission--subject only to the condition that no such program is commercially distributed (in cassette or on disc) to the general public. There is no restriction on the type of record, the identity of the performers, the length of record use, the number of records in a program, the number of program recordings, or the extent of program distribution.

Public Broadcasting

Probably the most complicated and innovative provision in the new Copyright Law, Section 118 calls for a formal procedure of a new Copyright Royalty Tribunal to establish public television and radio rates for music and photographs, after good faith negotiations by public broadcasters with music authors and publishers, and with photographers and their agencies. Music and photograph rates must be published by the Tribunal within seven months after appointment of the Tribunal--presumably before the end of 1977. Both the public broadcasters and authors/publishers are encouraged to negotiate in self-organized groups by virtue of an explicit anti-trust exemption on both sides, and full weight is to be given by the Tribunal to whatever private agreements are arrived at earlier. The public broadcasting use that will be covered by the final rates will include all production, duplication, distribution, and broadcast activities, so that no further fees will be payable by any public broadcasting station or agency.

While literary works are excluded from Copyright Royalty Tribunal rate-setting, the Congressional report accompanying Section 118 also urges literary authors and publishers to establish a flexible and workable procedure for book and periodical clearance for public broadcasting programs. An appropriate anti-trust exemption has also been provided for this, and the Copyright Office is required to report to Congress in January 1980 on how such voluntary private arrangements have worked out in the meantime--presumably to avoid further Congressional action.

Section 118 does not cover dramatic works such as plays and operas, motion pictures and television programs, nor television dramatizations of non-dramatic literary or musical works. Nor does Section 118 permit a public broadcast program to be drawn substantially from a single photograph-book, or to include motion picture films or other audiovisual works. Standard clearance requests will continue to be necessary in those regards.

* * * *

General

It should be noted that under the new Copyright Law, the copyright term has been extended for new copyrighted works to the life of the author plus fifty years. Existing copyrighted works can be renewed for a second term of forty-seven years after an initial twenty-eight year term to extend

10

copyright protection to seventy-five years in all. In addition, by virtue of successive interim arrangements, copyrights from 1906 on have been protected if properly renewed. As a result, only works copyrighted prior to 1906 can be safely counted on to have fallen into the public domain and hence be freely available for educational use without permission.

COPYRIGHT QUESTIONS AND ANSWERS--

EDUCATIONAL USE OF BROADCAST PROGRAMMING

UNDER THE 1976 COPYRIGHT REVISION ACT

a working paper prepared by
the National Association of
Broadcasters for use by
broadcast stations in handl-
ing inquiries from local
educational interests

COPYRIGHT Q & A NO. 5
EDUCATIONAL USE OF BROADCAST PROGRAMMING UNDER
THE 1976 COPYRIGHT REVISION ACT*

National Association of Broadcasters

A. General Provisions

1. Q. Is broadcast programming subject to copyright protection?

   A. Yes. A broadcast program (e.g., sports, news coverage, live performances of music, etc.) will be accorded Federal statutory copyright protection if recorded prior to or simultaneously with transmission. The recorded work would be considered a "motion picture" or "audiovisual work" under the new copyright law.

2. Q. What protection is afforded a broadcast program which is not recorded?

   A. An unrecorded broadcast is not eligible for Federal statutory copyright protection. Fixation in a tangible medium of expression, such as film or video tape, is a basic condition of copyright protection. However, an unrecorded broadcast would remain subject to protection under state common law or statute.

3. Q. Are broadcast programs usually copyrighted?

   A. Yes, generally speaking. For copyright purposes, broadcast programming can be assigned to one of three categories, depending on the owner of the copyright in the program:

   (1) Network programming which includes programs produced and/or owned by the network,
   (2) Programming produced by independent program producers and licensed to networks or stations for network or local broadcast; and
   (3) Local programs, produced and owned by local stations.

   Programs produced and owned by independent producers invariably are prerecorded and copyrighted by the producer. Usually, a network or station will not purchase the program but will obtain only a license to exhibit the program for a specified number of times during a specific period of time. Thus, the producer usually retains the copyright in the program. Most entertainment programming broadcast by the networks falls into this category.

   Most network programming, primarily news, documentaries, and sports, now is copyrighted.

   Local programming may or may not be copyrighted, depending on the individual stations' policies. However, more local stations will begin to to copyright their programs as January 1, 1978, approaches. As of that

*This memo is designed to assist stations in handling inquiries from local educational interests who may wish to make use of programs broadcast by the station.

date, local stations will be able to collect royalties from cable television systems which retransmit their programming beyond the stations' local service areas. The ability to obtain royalties will create an obvious economic incentive to local stations to copyright their programs.

4. Q. Are broadcast commercials copyrighted?

   A. Yes, commercials usually are copyrighted by the sponsor for whom they were produced. Other broadcast matter of short duration such as public service announcements also may be copyrighted.

5. Q. Can news programs be copyrighted?

   A. Yes, although this was an issue in the CBS-Vanderbilt "news archive" case, which now has been dropped, the 1976 law and legislative history leave no doubt that television news broadcasts may be copyrighted.

6. Q. How can I ascertain whether or not a broadcast program has been copyrighted?

   A. It depends on the type of program. Programs produced by independent producers, which would be considered "publicly distributed" if exhibition rights have been sold to a station or network, must include a copyright notice (e.g., © MCA, Inc. 1972) to be subject to statutory copyright protection. Network and local programming, however, may or may not be "publicly distributed." If so, the copyright notice is a prerequisite to Federal statutory copyright protection. If not, no copyright notice is required, even where the program has been broadcast. Consequently, parties should contact the network or station which broadcast a program without a copyright notice to ascertain its copyright status.

7. Q. If I am aware that a particular broadcast program has been publicly distributed, but no copyright notice was displayed, can I assume that it has not been copyrighted?

   A. Not necessarily. An unintentional omission of the copyright notice will not invalidate the copyright if the notice has been omitted from only a relatively small number of copies distributed to the public; (2) registration is made before or within 5 years of publication without notice and a reasonable effort is made to add the notice to copies already distributed; and (3) the notice was omitted contrary to an agreement with the author.

8. Q. If I rely on the lack of notice as an indication that a broadcast program has not been copyrighted, am I still liable for infringement if I use that program without authorization?

   A. Yes, but an innocent infringer who relies on an authorized copy lacking notice cannot be held liable for actual or statutory damages. The court, however, may (1) allow recovery of profits; (2) enjoin the infringement or; (3) require payment of a license fee for continuation of the infringement.

B. Reproduction by Libraries and Archives

9. Q. What rights does the new law grant to libraries regarding reproduction of copyrighted material?

A. The new law provides that it is not an infringement to reproduce no more than one copy of a work or to distribute such copy, if (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage; (2) the collections of the library or archives are (i) open to the public or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field and (3) the reproduction or distribution of the work includes a notice of copyright.

10. Q. Does the new law permit libraries meeting the above conditions to engage in off-air copying of broadcast programs?

A. No. Except as to daily network news broadcasts, the library reproduction and distribution provisions of the new law do not apply to motion pictures or other audiovisual works. (The extent to which libraries or other parties may copy off-air under the fair use provision of the new law is discussed, infra, in questions 24 through 26.)

11. Q. Does a qualified library have any right to reproduce or distribute broadcast programs, other than network news programs?

A. Yes, but these rights are extremely limited. First, if a qualified library already had in its collections a copy of an unpublished broadcast program, it may reproduce no more than one copy solely for purposes of preservation and security or for deposit for research use in another library or archive.

Second, a qualified library may make one copy of a published broadcast program already in its collection duplicated in facsimile form solely for the purpose of replacement of a copy that is damaged, deteriorated, lost or stolen, if the library or archives has determined that an unused replacement cannot be obtained at a fair price, including recourse to commonly-known trade sources in the U.S., the publisher or other copyright owner or authorized reproducing service.

12. Q. To what extent may libraries and archives which meet the requirements described in Q & A 9 copy and distribute news programs?

A. The new law permits qualified libraries to make off-the-air video tape recordings of certain news programs, and to make a limited number of copies of each program for limited distribution by lending to scholars and researchers for use in research.

13. Q. What news programs fall under the provision for limited reproduction and distribution by qualified libraries and archives?

A. This provision applies to (1) the daily newscasts of the national networks, and local stations, which report events of the day; (2) interviews concerning current news events and (3) on-the-spot coverage of news events. It does not apply to documentaries (except documentary programs involving news reporting), magazine format or other public affairs broadcasts dealing with subjects of general interest to the viewing public.

14. Q. Are there any limitations on the rights of researchers who borrow broadcast news tapes?

A. Yes. Libraries may lend the tapes only for use in research. A recipient of a copy of a television broadcast may not perform, copy, or sell, whether or not for profit, a copy of the television news broadcast.

C. Broadcast Programming in the Classroom

15. Q. May an instructor show a broadcast program to the pupils in his classes?

A. Yes, if the following conditions are met: The showing must be in the course of face-to-face teaching activities of a non-profit educational institution and must take place in a classroom or similar place devoted to instruction. Furthermore, the copy by means of which the showing is made must have been lawfully made.

16. Q. May an instructor show a broadcast program by way of a transmission of that program from an outside location to the classroom?

A. No. Broadcasting or other transmission from an outside location, whether radio or television and whether open or closed circuit is not permitted. However, showing of a motion picture by means of a projector is permitted, as would be showing a video tape by means of a video tape playback unit and monitor located in the classroom itself. Although the teacher and his students must be present in the same general place, they need not be able to see each other. Furthermore, the copy of the program utilized for the showing must be located in the same place.

17. Q. What would be considered "teaching activities"?

A. Basically, teaching activities would encompass systematic instruction of a wide variety of subjects, but would not include a showing of a broadcast program given for recreation or entertainment of any part of the audience whatever the cultural value or intellectual appeal of the particular program.

18. Q. May anyone other than the instructor in a particular course show the program?

A. Yes. A guest lecturer or pupil would be permitted to show the program if his instructional activities remained confined to the classroom. However, the exemption from normal copyright liability is lost if parties other than the instructor, a guest lecturer, or pupil in the course conduct the showing.

19. Q. Is a classroom showing of a broadcast program permitted if students other than those enrolled in the class are present?

A. No. The exemption applies only where the showing is made to the enrolled members of a class. As noted above (Q & A 17), a showing of a broadcast program for recreation or entertainment of any part of the audience is not permitted.

20. Q. Could a broadcast program be shown in places other than an actual classroom?

A. Yes, the showing may take place in any location devoted to instruction in the same way a classroom is. For example, the program

could be shown in a studio, workshop, gymnasium, training field, library, or auditorium provided it is actually used as a classroom for systematic instructional activities. However, a showing in an auditorium or stadium during a school assembly, graduation ceremony, class play, or sporting event, where the audience is not confined to members of a particular class, would not be permitted.

21. Q. May an instructor obtain a copy of a broadcast program lawfully recorded by a library or archive and show it to his classes?

A. No. The exemption for face-to-face teaching activities does not apply where the copy used for the showing is not lawfully made and where the instructor knows or has reason to know that it was not lawfully made. A copy made pursuant to the provisions permitting libraries and archives to reproduce and distribute copyrighted material is not considered lawfully made for purposes of a showing in a face-to-face teaching situation. Furthermore, regarding news programs, the law was not intended to permit performance, whether or not for profit, by the recipient of a copy taped by the library for lending to researchers.

22. Q. If an instructor has obtained an "off-air" copy of a broadcast program made under a licensing agreement with the copyright owner or has purchased a copy from a properly licensed program distributor, may he show that program in the course of his teaching activities?

A. Yes. The new law appears to permit this sort of showing without permission from the copyright owner.

23. Q. Does the new law permit any unauthorized use of broadcast programs in instructional television activities?

A. No. The exemption in the law for instructional broadcasting is not applicable to motion pictures, the form in which most broadcast programs are copyrighted.

D. Fair Use

24. Q. What is "fair use"?

A. "Fair use" originally was a judicially created doctrine which permitted limited use of copyrighted material in certain circumstances without permission from the copyright holder. It serves to lend a certain amount of flexibility and practicability to what otherwise would be a very rigid system of exclusive rights under the copyright laws. In simplest terms, whether or not a particular use constituted "fair use" involved a judgement as to what proportion of a copyrighted work was used and as to the extent that use will lessen the value of the copyright owner's property right.

The Copyright Revision Act of 1976 gives the fair use doctrine statutory recognition by specifically providing that:

Fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means . . . for purposes such as teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement.

The new law prescribes that the following factors must be considered in determining whether or not a particular use constitutes "fair use":

(1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,

(2) The nature of the copyrighted work,

(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole, and

(4) The effect of the use upon the potential market for or value of the copyrighted work.

25. Q. Does the "fair use" provision of the new statute provide educators any new explicit rights to engage in off-air taping of broadcast programs for classroom use?

A. No. The new law was not intended to change the law as it applies to off-air taping for classroom use. Generally, the new law restates the present judicial doctrine of fair use and does not change, narrow or enlarge it in any way and courts remain free to apply the doctrine to particular situations on a case-by-case basis.

The affected interests have reached no consensus as to detailed guidelines, as has been the case with other types of copyrighted materials. Congress has encouraged the affected parties to continue their efforts to develop guidelines. Furthermore, virtually no judicial guidelines have been developed. Thus, until the parties devise guidelines or judicial guidelines can be derived from litigation in this area, the "fair use" doctrine's applicability to off-air taping for classroom use will remain somewhat indefinite.

However, the legislative history of the new law, as well as a reasonable consideration of the factors which must be considered in a "fair use" determination, indicates that fair use will have only extremely limited application to off-air taping of broadcast programs.

26. Q. In view of the uncertainty in the law, what protection exists for teachers who may be sued for infringement?

A. Congress had adopted an innocent infringer provision which directs the courts to remit statutory damages where a teacher or librarian at a nonprofit institution honestly believed and had reasonable grounds for believing that his or her use of the copyrighted work constituted "fair use." Furthermore, the intent of the new law is that the burden of proof as to the infringing party's good faith falls on the copyright owner.

Again, however, in view of the legislative history and the fact that most of the factors will weigh against a finding of fair use, it will be very easy for a copyright owner to rebut a claim that reasonable grounds existed for believing a use to be fair use.

AN EDUCATOR'S INTERPRETATION OF THE NEW COPYRIGHT LAW, 1977

by

Harold E. Wigren
National Education Association
Washington, DC

AN EDUCATOR'S INTERPRETATION OF THE NEW COPYRIGHT LAW, 1977

Harold E. Wigren

Foreword

I am quite sure that anyone who has followed the copyright struggle for the past decade is wondering how educators feel about the new law recently enacted by the Congress--whether we're about to jump off the Golden Gate Bridge or whether we're dancing in the streets! Would you believe it--neither is the case, or perhaps both are true, depending upon whom you talk to in the educational community.

On the one hand, there are those who feel strongly that we compromised our souls and have ended up with a rigid set of commandments which make teaching virtually impossible. These individuals argue that the law contains so many "ifs," "ands," and "buts" that it defies certitude. In their opinion, the teacher must still carry a lawyer around in his pocket--or perhaps two or three lawyers--in order to determine whether or not a contemplated use is in fact a fair use or an infringement.

On the other hand, a large body of educators feel that the new law does, in fact, give help to the teacher in understanding the limits of acceptable classroom practice in the use of copyrighted materials. The 1909 law under which we operate--and will be operating until the end of 1977--gives little reasonable certainty about any practice. These educators feel that we've won a considerable victory for teachers because of the many features in the law which would have seemed totally impossible to achieve a decade ago. I happen to belong to this group!

Educators' Interpretation of the Law

The National Education Association has been actively involved in all phases of the copyright revision program since 1963 when NEA first organized the Ad Hoc Committee on Copyright Law Revision. Representing 42 educational organizations and institutions, this coalition at the time of its establishment was unique in the educational world. It developed a consensus and became the principal spokesperson for the educational

community in the lengthy copyright Congressional struggles. Throughout this 13-year period, the Ad Hoc Committee pressed education's case before Congress in an effort to protect the public interest in the revision of the law. Our objective has been to strike a fair balance, on the one hand, between the rights of proprietors and, on the other hand, the rights of consumers, principally teachers and librarians who need to use copyrighted materials not for their own gain but for the benefit of the children of all of our citizens including those of authors and publishers!

What is our perception as to the effects the law will have on teachers and other members of the educational community? Before attempting to assess how education fared in the new law, let me first point out that in the legislation finally approved by Congress, no side of the controversy really "won" or "lost." Each achieved some goals; each was disappointed in some aspects. Overall, the new law represents a compromise between the various interests involved. Although the law is, in our judgment, still heavily weighted on the side of the proprietors, let it be said that the educational community has been able to have written into the law, certain safeguards for teachers and librarians. These safeguards guarantee not only the protection of their rights as public employees to carry on the responsibilities for which they are employed, but also the protection of their right-of-access to information for teaching and learning purposes. We do not consider, nor should we consider, the new Copyright Law as a hunting license to copy anything we want to copy. To do so would seriously infringe on the rights of authors, many of whom are our own members. What we have tried to do is enable teachers to have access to information at the time they need it most--that teachable moment when students are ready to learn--and to protect the free flow of information so vital in a democratic society. With this as a backdrop, let me comment on the various parts of this new law which have particular relevance for the educational community. I have chosen to comment specifically on eight areas of the new law: fair use, non-commercial nonprofit uses, burden of proof, copyrighting of government publications, instructional broadcasting, off-air copying, interlibrary loans, and duration of copyright.

Fair Use

Congress has taken the amorphous doctrine of "fair use" and caused it to be translated into a reasonably reliable and certain guide for teachers in their use of copyrighted materials. In the 1909 law, the doctrine of "fair use" is neither spelled out nor is it statutory. The 1909 law left the meaning of fair use entirely to the courts to apply on an individual case basis. The teacher thus had neither guides nor protection under the Copyright Law. Teachers had no idea of what constituted fair use of materials in the classroom. Nor did copyright lawyers know for a certainty what constituted fair use! Under the new law, in the case of print materials, the teacher is given specific guidelines and protection.

The new law codifies the "fair use" doctrine. It refers to purposes such as criticism, comment, news reporting, teaching, scholarship, or research, and specifies four criteria to be considered in determining whether or not a particular instance of copying or other reproduction is fair. For the first time, it also specifies clearly after the word "teaching" the phrase "including multiple copies for classroom use" which is a great achievement for educational uses of materials. Depending upon the circumstances, fair use might now cover the making of multiple copies as well as the making of a single copy of an article or short whole work.

The Congress made it clear that the new Copyright Law defines "fair use so as to enable teachers to make (1) single photocopies (for their own use in preparing to teach) of a chapter from a book, an article from a periodical, a short story or poem, a chart or picture from a book, periodical or newspaper; and (2) multiple photocopies for classroom use by pupils, subject to criteria such as (a) the number of words to be copied, (b) the spontaneity of the need for such copies (at the teachable moment when pupils are ready to learn), and (c) the cumulative effect of such copying.

For the first time, Congress has endeavored to define fair use and set up *minimum* guidelines for classroom copying in not-for-profit educational institutions. The House Committee Report which was adopted by the Senate-House Conference Committee and the Congress will be used in judicial interpretation of the law's meaning. It incorporates the agreements reached between the educators and the publishers, both on print materials

and on music. This Report includes very specific examples of what multiple copying is legally authorized for teachers in classroom teaching. No longer should it be necessary for a teacher to have a hot line to a lawyer in order to check on the legality of contemplated copying for classroom use.

The NEA was a member of the small negotiating committee that reached the agreements with publishers of books, periodicals, and music--an agreement that gives very specific minimum guidelines as to what teachers may copy, and under what conditions. *These guidelines, it must be pointed out, are minimum not maximum!* Practices beyond the guidelines may still be fair use, although these are not specified. The Report clearly states that certain things are mandatorily permitted. These are proper and are spelled out in the guidelines. The clear intention is to give a floor below which teachers cannot be pushed.

For the preponderance of copyrighted materials needed by the classroom teacher in the course of teaching, there is guaranteed protection. As for the next category, above minimum use, there is assurance that multiple copying of excerpts, for example, is reasonable and that the teacher may be protected if he exceeds the quantitative figure set in the guidelines. Common sense here must prevail. Obviously, if the teacher copies a complete article, story, or essay, and that article, story, or essay is 265 words (instead of the 250 prescribed as minimum) there would be very little likelihood that any judge would consider that the teacher infringed the copyright. Likewise, if a teacher needed ten or eleven copies of an excerpt, nine would be guaranteed permitted and the ten or eleven could be a reasonable extension under the guidelines. Whether any use which exceeded the minimum would be permitted would, of course, depend on the circumstances in the situation and the degree to which the four principal criteria of fair use had been abrogated.

It should be borne in mind that spontaneity is the central criteria to be considered in determining whether a given use of a work is a fair use. Is one to say that a teacher can be spontaneous only nine times a term? It is the spirit of the law rather than the letter of the law that is intended here. Teachers are reasonable persons and we can only hope that publishers and authors will be, also. However, it would not be spontaneous if a teacher plans to copy precisely the same material for the same class year after year.

Differentiation between Commercial and Non-Commercial Use

For the first time, the law recognizes a distinction between commercial and nonprofit *educational* uses of copyrighted materials. The law includes a very specific provision which recognizes that whether a specific use of materials is (a) a commercial use of (b) an educational nonprofit use is a factor in determining if that particular use is a "fair use." Section 107, *Fair Use*, includes this amended wording for criterion No. 1 in determining whether a given use of a work is a fair use:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.

The House Judiciary Committee Report states:

> The Committee has amended the first of the criteria to be considered--"the purpose and character of the use"--to state explicitly that this factor includes a consideration of "whether such use is of a commercial nature or is for nonprofit educational purposes." This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, the commercial or nonprofit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.

This statutory provision gains special significance from the fact that the above-referred-to guidelines which appear in the Committee Report dealt only with minimal examples of fair use. For uses beyond the agreed-upon minimal "fair use," the recognition of a special difference with "fair use" for nonprofit educational uses is a major advance for teachers in the use of copyrighted materials as supplements to the use of textbooks in classrooms. Since this is a new statutory provision regarding nonprofit educational uses, it is possible that there may be judicial interpretations as to the scope of its reach.

Burden of Proof and Remedies for Infringement

For the first time in copyright law and practice, the law includes a provision which shifts the burden of proof from an innocently infringing teacher to the copyright owner, where a teacher has innocently infringed copyrighted material. In this respect, furthermore, the court cannot assess damages or other money penalties against the innocently infringing teacher.

This is a provision long sought by the educational community. With the precarious nature of fair use in the 1909 law--and to a lesser degree in the new law--there has been understandable uneasiness among teachers lest they exceed the bounds of fair use unwittingly.

Section 504(c)(2) of the Law provides:

> The court *shall remit* statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under Section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phono-records; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity . . . infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

Section 504 of the House Report under *Damages and Profits*, states the intention of the law in this way:

> In addition to the general "innocent infringer" provision, clause (2) deals with the special situation of teachers, librarians, archivists, and public broadcasters, and the nonprofit institutions of which they are a part. Section 504(c)(2) provides, that where such a person or institution infringes copyrighted material in the honest belief that what they were doing constituted fair use, the court is precluded from awarding any statutory damages. It is intended that, in cases involving this provision, the burden of proof with respect to the defendant's good faith should rest on the plaintiff.

The conference report further confirms tha- the concept of "teacher" in the guidelines on print materials which were negotiated between the publishers, authors, and educators is intended by Congress to be defined broadly and to include "instructional specialists working in consultation with actual instructors." This of course would include instructional media specialists.

The question has arisen: In the case of an infringement, who would be sued--the teacher, the school, the principal, the superintendent, or the school board? Clearly, the teacher is liable, but the school district may also be liable. The person who does the infringing is the *prime* offender. One often hears that ignorance is no excuse for breaking the law. Who, then, is the "innocent infringer" and how does the court decide whether the teacher is innocent? Can one assume that the teacher is entitled to the first infringement under the presumption of innocence and after that

he/she would be considered to know better? Not so. *Frequency* of the use is not one of the criteria. Rather, it is the *knowing*. The teacher would know whether he/she knew or did not know. In the final analysis, however, the publisher has to show it was not an innocent infringement. We recognize that the continuation of an activity after it has been held or charged to be an infringement would destroy any argument of innocence. The new law represents, nonetheless, a revolutionary change in the penalty provision and one which is welcomed by the educational community.

Copyrighting of Government Publications

The new law continues to provide that works produced for the U.S. Government by its officers and employees are not subject to copyright protection. The House bill had retained the general prohibition against copyright in U.S. Government works, but made one special exception in favor of any publication of the National Technical Information Service. The Secretary of Commerce, under the House bill, would have been authorized to secure copyright in such works for a limited term not to exceed five years. The conference committee fortunately refused to incorporate the House provision in the new law. The education and library communities applaud this action because, had the exception been approved, it would have created a hindrance to the free access by the public to publications which have been produced with public monies. The educational community has long maintained that information that has been prepared with public funds should be in the public domain. We were, therefore, apprehensive that one such exception could lead to others in still other departments of the government.

We are concerned, however, that the whole matter may again rise to the surface very shortly because the Conference Committee further recommended that the NTIS request for limited copyright (in order to control foreign copying) be considered at hearings early in this session of Congress.

Most of the educational community agrees with the American Library Association's vigorous opposition to granting such an exception to the Department of Commerce and supports ALA's testimony before the House Judiciary Committee which maintained as follows:

> It is difficult for us to believe that the Subcommittee in adopting this amendment really meant to allow the Secretary of Commerce the discretion to copyright all the 900,000 titles disseminated by NTIS, a number that is currently growing by about 60,000 titles annually. In requesting limited copyright protection for NTIS, the Commerce Department drew an analogy with the standard reference data

> prepared by the National Bureau of Standards. In reality, however, the range of NTIS publications is so diverse and their numbers so great that the analogy is misleading, to say the very least.

ALA then went on to point out that unlike the standard reference data program, the NTIS system is not confined to a few highly technical publications. They listed typical diverse topics such as whales, labor relations, migrant workers, American Indians, "winning at backgammon," health planning, agriculture, energy, and urban technology which were but a few of the subjects covered by the hundreds of thousands of titles disseminated by NTIS. ALA then raised such questions as these:[1]

1. Is it your intent that the Secretary of Commerce is to have discretionary power to secure copyright not to exceed five years for all 900,000 and more titles now disseminated by NTIS?
2. If not all titles, which ones and under what criteria is the decision to be made on whether or not to copyright? Would the authors or originating agencies be consulted?
3. Is the amendment meant to take effect retroactively allowing the Secretary to copyright all titles held, or would it apply only to titles acquired by NTIS after the enactment of the new copyright law?
4. Would the amendment permit the Secretary of Commerce to assign the copyrights to persons or groups outside the government for example, to a commercial publisher or other middleman?

These questions are just as relevant in the new hearings as in the old hearings and we would hope that Congress would not grant the authority requested by NTIS.

There is, however, one very disturbing aspect of the new law relative to the dissemination of government publications. It has to do with the copyrighting of works prepared under Government contract or grant. The House Report discusses this matter at some length. After reciting the matter of "double subsidy" as being the argument usually made against copyright, it states:

> The bill deliberately avoids making any sort of outright, unqualified prohibition against copyright in works prepared under Government contract or grant. There may well be cases where it would be in the public interest to deny copyright in writings generated by Government research contracts and the like; it can be assumed that, where a Government agency commissions a work for its own use merely as an

---

[1] Eileen Cooke, American Library Association, Washington Office. Letter to the Hon. Robert W. Kastenmeier, April 23, 1976.

> alternative to having one of its own employees prepare the work, the right to secure a private copyright would be withheld. However, there are almost certainly many other cases where the denial of copyright protection would be unfair or would hamper the production and publication of important works . . . .

We are aware, of course, of the present policy of the Office of Education and the proposed policy of NIE relative to the private copyrighting of publicly-financed materials. We believe, however, that an earlier policy of the Office of Education, which forbade such copyright was correct. We are also aware of the oft-stated rationale for this policy, the presumed more effective distribution process of commercial publishers because of the overload on the U.S. Government Printing Office. It is our strong contention that to the degree that such a problem does in fact exist, it should be attacked directly either with Congress or with the Government Printing Office. Administrative difficulties as may exist are, in our judgment, not a valid justification for rejecting the fundamental public policy that the government should not copyright its publications and that government-financed publication should not be copyrighted for private gain.

USOE and NIE personnel argue that USOE and NIE doe not copyright anything, nor do they intend to copyright anything. They insist that it is the contractor or grantee which does so. To us this is a play on words. Our position is, simply stated, that a copyright is a statutorily-protected monopoly. From that point of view, we see no meaningful substantive difference between the USOE copyrighting a work produced under its contract or grant or having the copyright taken out in the name of the USOE's contractor or grantee--the effect still is a monopoly on materials produced as a result of the expenditure of Federal funds.

Furthermore, we have no objection whatsoever to any publisher having copyright protection to what it develops at its own cost *without Federal funds*. Our objection is to giving one publisher a copyright monopoly over a product produced by Government funds. In most cases, the USOE grants the copyright privilege to a single specially-chosen private sector publisher. We would open up instead cooperation between the public and private sectors by making such publications available in the public domain to any and all publishers who would like to use them in order that there would be the widest possible competition in circulation at a cost lower than the copyright monopoly would allow or involve.

Instructional Broadcasting

The educational community has succeeded in obtaining in the new law, exemptions for instructional broadcasting which are the same as those for face-to-face teaching in the classroom. The right of teachers and pupils to perform and display a nondramatic literary or musical work which is "transmitted for reception in classrooms or similar places as a part of the systematic instructional activities of the school" and to perform and display a work if it is designed for professional in-service development activities for teachers is a significant achievement for education. The law also reaffirmed the right of a teacher to perform and display any copyrighted work in the course of face-to-face teaching "in a classroom or similar place devoted to instruction." Thus, for all practical purposes, the new law provides for a substantial but limited exemption for noncommercial uses of nondramatic materials in nonprofit instructional broadcasting. If consistent with provisions contained in Section 110(2), the performance or display of a nondramatic work in an instructional program is exempt from royalty payments and from clearance procedures. The provisions of Section 110(2) specify that the program:

a. Must be a regular part of the systematic instructional activities of a government body or a nonprofit educational institution.

b. Must be directly related and of material assistance to the teaching content of the transmission.

c. Must be made primarily for reception in the classrooms "or similar places normally devoted to instruction," reception by persons to whom the transmission is directed because their disabilities prevent their attendance in classrooms, or reception by officers or employees of governmental bodies as a part of their official duties or employment.

These were all points the Ad Hoc Committee had advanced earlier in testimonies to the Congress. In fact, the word "systematic" instructional activities originated with the Ad Hoc Committee as did the idea of exempting in-service education uses for teaching personnel. Telecourses for credit would be included in this definition provided such courses were geared to regularly enrolled students.

In the special provisions enacted by the Congress for noncommercial broadcasting, there is a restriction which permits 30 copies under a seven-year use limitation. While not as liberal as we would have liked to have obtained, the 30 copy, seven-year limitations are,

nonetheless, a far greater improvement than the six months' ephemeral copying privilege which had been proposed in the mid-'60s.

Off-the-Air Copying

For the first time in copyright history, the Congress officially recognized that off-the-air taping of television and radio programs for nonprofit educational use by teachers in classrooms may be "fair use." However, there are no accepted guidelines enunciated, but the Conference Report expects that such guidelines will be developed in the near future. It, in fact, urges that representatives of educational groups and proprietary interests affected, work together to develop guidelines in this area which then could be presented to the Congress for consideration. If approved, the guidelines would be added to the Report which accompanies the legislation.

Meetings that have been held previously between educators, commercial broadcasting representatives, motion picture interests, commercial distributors of educational films, and public broadcasters to arrive at such guidelines collapsed due to opposition from commercial interests. Because of the potential legal difficulties inherent in off-air copying, it is urgent for the various interests involved to get together on this as soon as possible so as to arrive at reasonable and workable guidelines in this area. In my opinion, the Register of Copyrights should take the lead role in such negotiations because an arbitrating force seems certain to be needed to resolve the deep-seated conflicting interests involved.

In the case of off-air copying of non-commercial television and radio programs by classroom teachers, Section 118 does provide automatic permission for schools to re-record such programs off the air for instructional use only just so long as the copy thus made is destroyed after a seven-day period. We recognize, however, that this privilege does not extend to dramatic works, non-dramatic literary works, motion pictures, other television programs, or other audiovisual works, but only to non-dramatic musical or pictorial works which are included in the program. The public broadcasting industry has made many favorable concessions to schools in recent months to make instructional television programs available to classrooms through off-air taping.

The Public Broadcasting Service, through its local affiliate stations, has initiated a nationwide policy giving schools the right to record off the air and re-use many, but not all, of their in-school and evening programs for a seven-day period. The local public broadcasting station has a list of the series for which this privilege is granted and must be contacted in advance for permission. No charge is made for this. If, however, schools wish to keep the convenience copy beyond the seven-day period, they must obtain further permission from the copyright owner of the program who must obtain, in turn, the appropriate audio-visual rights from the owners of the materials included in the program. Without such permission, the retention of the program beyond the seven-day limit will be considered an infringement.

Because the new law rarely mentions the word "videotape" there is certain to develop a veritable jungle of legal considerations and law suits in this area which should please the hearts of many lawyers for months to come. New videocassette equipment, which is especially designed for taping off-the-air programs on an automated basis round the clock, has already given rise to one large lawsuit. As video technology develops even further and includes videodiscs and other technologies, the situation will get even more complicated.

Interlibrary Loans

The educational community was able to obtain in the new law, protection of interlibrary loans and of the right of libraries open to the public to make photocopies for their patrons. Section 108(d) authorizes the making of a single copy of a single article or a copy of a small part of a copyrighted work in the library's collections for purposes of interlibrary loan, provided that certain conditions are met.

The wording of the statute places responsibility for compliance on the library requesting the photocopy and not on the library fulfilling the request. It is important to point out that at five-year intervals, the Register of Copyrights must advise Congress how this provision is working. Libraries are presently caught between the publishers who sell information and the scholars/researchers who wish to use this information for educational purposes or research. Librarians--it must be remembered--photocopy for scientists, educators, and the public, not for themselves.

As Dr. Martin M. Cummings, Director, National Library of Medicine, once pointed out:

> Reprography was introduced as a means of interlibrary lending because it was not longer feasible to have original documents constantly in motion on trucks, ships, and planes. Nearly always the requester is searching a single article in a larger volume, not the full issue or volume itself. The efficiency of interlibrary lending through photocopying was the stimulus to its growth and expansion, not any deliberate desire by librarians to deprive publishers of income. There is no reliable economic evidence that this system has caused financial damage to publishers. On the contrary, all of the evidence suggests that interlibrary lending through photocopy has had no significant effect on publication sales or subscriptions. Low quality journal publications failed long before xerography was invented. Their rate of failure has not changed since the introduction of reprography.

Dr. Cummings had warned that if the cost of interlibrary lending through photocopy became prohibitive, libraries would not purchase more journals but rather, library lending would return to its older, less efficient form. Hopefully, the new copyright law will strike the balance necessary between the publishers and the users (the customers who buy their products, the libraries and individual consumers).

Educational Uses of Music

Music in the new law has received mixed reactions among teachers. Most feel that the law does not solve all their problems but, on the whole, the situation is a great deal better than it was under the present law. Some of the problems may not be in the law itself but in the business practices which have been set up to deal with specific cases.

As a case in point, there is the matter of extra scores for the various instruments in the orchestra. A teacher might purchase a full symphonic set for his school orchestra, but even then not have enough of some parts for certain instruments, such as oboe or flute. He may have, for example, only four tenor saxophone parts in the set but have six students who need that part. Understandably, he does not want to buy another full set in order to obtain two more tenor saxophone parts. Here is a place where the music publisher needs to "give" a bit. In fact, some publishers are perfectly willing to sell the extra parts needed if they are requested by the teacher to do so. The difficulty, however, is that the teacher purchased the set from a jobber or middleman who is not willing to comply with the teacher's request, saying simply that he does not carry

spare parts in stock! In desperation, the teacher then is likely to resort to the Xerox machine.

It is also true, of course, that teachers very often have different needs than music publishers and tend to see things through different eyes. A publisher may wish to limit the number of instrumental players for a particular instrument in order to insure a given effect when the music is played. The teacher, on the other hand, has a different need. He/she needs to involve as many students as possible in the school orchestra or band and is just as interested in doing this--perhaps even more so--as he is in obtaining a given effect with the music!

The emergency copying provision is widely applauded. Teachers feel this makes good sense. Provisions for recordings for self-evaluation by students and for use at rehearsals have also met a responsive chord among teachers, as does the provision granting permission for teachers to make a tape of excerpts from a recording for use on examinations. That teachers also may edit or simplify printed copies of music, provided that the fundamental character of the work is not distorted or the lyrics altered or added, seems reasonable enough. On the whole, the reaction of music teachers to the new law is more positive than negative.

Duration of Copyright

The single most frightening loss to educators in the new copyright law is the duration of copyright provision. The law has been changed from a duration of 28 years plus 28 years renewal period to "life of the author plus 50 years." The educational community much prefers the present arrangement of 28 plus 28, and urged its continuance or, at the least, 28 plus 48 years. This renewal arrangement enables teachers to use, at the end of 28 years, the great majority of copyrighted materials that are never renewed because the copyright owner let the work go into the public domain.

When one reviews the history of American copyright law, one discovers that the Copyright Act passed immediately after the adoption of the Constitution regarded 14 years as a limited time for initial terms, and the patent law (which comes under the same constitutional provision) still has only a 17-year term. Therefore, the drive for conformity to foreign laws (which is the principal reason advanced for the change in duration) seems to ignore the fundamental limitation in our Constitution. The Constitution itself sets our copyright law apart from all foreign

copyright laws; it permits copyright only "for limited times." Consequently, the new law in our judgment turns its back on this principle.

Education still believes and accepts the rationale of the Register's 1961 Report, as follows:

> We do not believe that the maximum term of copyright--which we are proposing be 76 years from first public dissemination--is necessary or advisable for all works. Experience indicates that the present initial term of 28 years is sufficient for the great majority of copyrighted works: less than 15 percent of all registered copyrights are being renewed at the present time.

The Register continued:

> The percentage of renewals varies from one class of works to another. During recent years, for example, renewals ranged from 70 percent of the eligible motion pictures, down through 35 percent for music, 11 percent for periodicals, 7 percent for "books" (which includes text material published in various forms) to less than 1 percent for technical drawings. (*Copyright Law Revision*, Report of the Register of Copyrights, July 19, 1961)

We feel that the new law will protect the heirs more than the authors themselves--and does so at the expense of the public good, generally.

In Conclusion

Those of use in education who have been involved in the 14-year struggle to revise the U.S. copyright law recognize the obligation we have to educate our members about the new law, the rationale behind it, and about the need to abide by it. What we constantly have to reckon with is that we are asking, in one sense, for many of our most creative, brightest, and most energetic members to curtail and cut back on what they have been accustomed to doing over the years. Because they have not been challenged in the courts or even by publishers these uses of copyrighted materials by teachers have been customary uses. One can argue, persuasively, as does Harry N. Rosenfield, attorney for NEA, that:

> As common law doctrine, "fair use" can derive from customary use. A copyright use sanctioned by custom is per se "fair use." Once a "fair use" has been molded by custom, it operates without regard to the judicial criteria otherwise used by the courts in determining "fair use."

In *Williams & Wilkins Co. vs. the United States*, the U.S. Court of Claims in its majority opinion stated:

> Furthermore, it is almost unanimously accepted that a scholar can make a handwritten copy of an entire copyrighted article for his

> own use, and in the era before photoduplication it was not uncommon (and not seriously questioned) that he could have his secretary make a typed copy for his personal use and files. These customary facts of copyright-life are among our givens.

Judge Oscar H. Davis of the Court of Claims emphasized this point by noting that the practice of copying an article was based on "years of accepted practice" and the "common" practice of copying copyrighted documents for court use.

This same practice has gone unchallenged in the schools and is considered as "the customary thing to do." We now face the enormous task of persuading schools and teachers to stop doing what at least some of them have been doing. Our only ability to change behavior in this regard will depend to no small degree on teachers recognizing the reasonableness of the guidelines which we have agreed upon on their belief. Admittedly, if we were to take a plebiscite of teachers, nationwide, to get their approval of the compromise which has been negotiated, we might find that a large majority of teachers might not go along. What is required, therefore, is understanding, tolerance, and goodwill combined with a willingness to take one step at a time and not "go to the mat" every time a potential infringement occurs "just to show teachers they can't continue to get by with something."

The degree to which publishers are rigid in their interpretation and public expression--to that degree publishers will run the risk of inviting real trouble. If publishers continue to press the situation and openly flaunt such admonition as "no part of this work in whole or in part may be copied without permission" then our people will likely start demanding from Congress that fair use be broadened!

QUESTIONS TO BE CONSIDERED IN DETERMINING

IF A GIVEN USE OF A WORK

IS PROBABLY A FAIR USE

prepared by the

National Education Association

QUESTIONS TO BE CONSIDERED IN DETERMINING IF A GIVEN USE OF A WORK IS PROBABLY A FAIR USE

National Education Association

(Based on the minimum standards of educational fair use contained in the House Report guidelines)

General

1. Is the contemplated use a spontaneous use? (i.e., you do not have time to write for permission and obtain clearance)
2. Is the contemplated use for nonprofit educational purposes rather than for profit?
3. Is the intent to use the material in the classroom (for instructional purposes) rather than in the school auditorium or elsewhere (for public performance)?

Single Copy

4. In the case of a chapter from a book, an article from a perifical or newspaper, a short story, essay or poem, or a chart or graph, is the contemplated use for the *teacher only* rather than for each member of the class and/or by other teachers?

Multiple Copies

5. When multiple copies are needed for classroom use, does the copying meet the tests of brevity and spontaneity outlined in the guidelines?
6. Is the copying limited to (a) one short poem, article, short story, essay or (b) no more than two excerpts from the same author, or (c) no more than three excerpts from the same collective work during one class term?
7. Is the copying of the material for only one course in the school in which the copies are made?

INFORMATION FUTURES
1977

8. Is the copying for use one time only and not to be repeated in subsequent terms?

9. Is the copying on the teacher's own initiative and not mandated by the school district or higher authority?

10. Can you allege that the copying is not to be used as a substitute for the purchase of books, publishers' reprints, or periodicals?

11. Will you agree not to use the copying for purposes of anthologizing or compilation?

12. Can you affirm that the work being copied is not a consumable work (workbook exercise, standardized test, test booklet, or answer sheet)?

13. Is no charge made to the student for the copying, in excess of the cost?

Instructional Television

14. Is the work to be performed, displayed, or played in the course of a face-to-face teaching situation in the classroom (or similar place devoted to instruction)?

15. Is the work being performed or displayed originating on closed-circuit television within the school building where the instructor and pupils are located rather than transmitted from an outside location into classrooms?

16. Is the performance or display a regular part of the *systematic* instructional activities of a nonprofit educational institution?

17. Is the transmission made primarily for reception by persons whose disabilities or other special circumstances prevent their attendance in classrooms or similar places devoted to instruction?

18. Is the transmission made primarily for reception by teachers or other government employees for their own professional development?

Music

19. Is the copying for emergency purposes only?

20. Is the copying for teaching purposes other than performance?

21. Do you contemplate making excerpts only and not a section, movement, or aria which would constitute a performable unit in itself?

22. Will your use involve editing or simplifying but under no conditions distorting or altering the fundamental character of the work?

23. Is the copying of performances by students for their own evaluation and for rehearsal purposes?

24. Is the copy of a sound recording of copyrighted music, made from sound recordings owned by the school or an individual teacher, to be used for the purpose of constructing aural exercises or examinations?

* * * * *

NOTE: If the above questions can be answered affirmatively in a given case, the use probably qualifies as a fair use. The above considerations should not be examined in isolation but rather must be reviewed together in determining the extent to which a given use is permissible under the law.

USES OF COPYRIGHTED MATERIALS

(Key considerations based on minimum standards of educational fair use under Section 107)

GENERALLY PERMITTED	GENERALLY NOT PERMITTED
Books and Periodicals	
Spontaneous	Planned Ahead
Nonprofit, Noncommercial	For Profit
Classroom Use	Public Performance
Single Copy (for teacher's own use)	Single Copy (for use by other teachers)
Multiple Copies (for classroom)	Multiple Copies (beyond classroom)
excerpts	entire book/chapter
one class/course	several classes/courses
teacher initiative	higher authority
non-consumable	consumable
one time only use	repeat use
supplement	substitute
separate use	anthologizing
cost only to student	charge to student above cost
Television and Radio	
Face-to-Face	Electronic, Remote
Closed Circuit	Open Circuit (commercial broadcast)
Systematic Instructional (classrooms)	Out-of-School Instructional
Special Audience (handicapped, disabled)	General Audience (public)
Teacher In-service, Government Employees	All Other Employees

Music

Emergency Copying	Permanent Copying
Teaching Purposes	Performance Purposes
Excerpts	Performable Unit
Editing, Simplification	Distortions, Alterations
Student Evaluation, Rehearsals (recordings)	Distribution of Multiple Copies (compulsory licensing)
Exams, Aural Exercises	Duplication of Tapes

Audio-Visuals

Unfinished Business

Off-Air Recordings of Commercial TV Programs

Fair use recognized but not spelled out--still unfinished business

EXAMPLES

Following is a list of examples of typical classroom practices in the use of copyrighted materials that have come to our attention. In each of these cases, the teachers concerned have asked our opinion at the NEA regarding the legality of uses which they described. There are many other examples of classroom practices that could be tapped, but these are typical of those practices which we have identified to date. The answers to the questions are given at the end of the exercise.

1. I duplicated 32 copies of a chart from a book in the teachers' reference library so the students could use it simultaneously in a discussion.

2. I made a transparency of a map in the *National Geographic* magazine on the growth of the United States to illustrate the westward movement.

3. I made transparencies of two graphs and one chart from the *New York Times* to use in explaining the stock market.

4. Each child in the class made one or two transparencies from charts and graphs on income taxes, gold, zoning, and business trends from *U.S. News and World Report, Fortune, Forbes, Business Week,* and the *Wall Street Journal* to illustrate reports they gave.

5. I taped the audio portion of a TV panel show on drugs to play back to my class the following week.

6. I duplicated recipes of national dishes of foreign countries from various cook books for the children in my class so that they might select one dish to cook at home for their families. They then reported to the class on this experience.

7. I duplicated 10 math problems from various textbooks to use for a test.

8. I duplicated 6 pages of an out-of-print textbooks to send to an absent student to cover the lecture I had given from the book in his absence.

9. To make a piece of music easier to read for a student accompanist, I transcribed a four-staff song into two staves.

10. As part of a ditto test I used excerpts of poems or paragraphs of stories from different authors, asking that each be evaluated.

11. To provide students with essential additional structure drills as an integral part of the language learning process, I take examples of sentences and parts of grammar drills from many sources and ditto them for use on tests.

12. In a non-graded school using individualized learning, I duplicated a page on synonyms and antonyms from a workbook used at a different grade level for a student who was weak in this area. Only one page was used for this review, as the student had completed all the workbook in an earlier grade.

13. To illustrate a lecture in a high school sex education course, I made a transparency of charts and diagrams of the human reproduction organs from a college anatomy textbook.

14. As a culminating unit of a study of the Western Movement in the United States, a group of students wrote a play but included some copyrighted songs. They presented the play in front of the student body and faculty in the school auditorium. They then entered a county competition for dramatic groups. No prize other than a certificate was involved. No charge was made for either performance.

15. I taped music from various radio programs to illustrate the forms of popular music--rock (hard and soft), country, society, jazz, folk, and swing.

16. The class was studying a four-week unit in social studies. We were using an anthropology kit that cost about $60.00 and included reproductions of artifacts, a phonograph record, a teacher's manual, and a map of the site of the dig. Using the single map caused confusion and frustration on the part of the students, so I used a ditto to reproduce enough maps to give one to each student team.

17. Our senior play was produced legally. During the final two weeks of rehearsal we had the bright idea of flashing titles and stage credits on the auditorium wall as is done in the movies. We did this with a filmstrip projector and used a music background without permission.

18. During lunch a group of my high school students debated on who in their opinion was the most outstanding Negro living today. The discussion was continued in class. It was decided that we would collect magazines, newspapers, and books for a temporary reference library so that each student could develop a paper on the man who in his opinion was making the greatest contribution. When the magazine, newspaper, or book was not available from the library, duplicate copies of the articles or excerpts from the books were made.

19. A school principal recorded on tape the audio portion of a morning TV interview with Dr. Haim Ginott. The psychiatrist was discussing ways in which a teacher should handle anger. The tape was then played to the teachers during an afternoon school staff meeting.

20. My high school English thematic study for nine weeks was "Filmmaking." The home movie I made was acting out the story of a popular novelty song that was a silly melodrama. My brother and some kids in the neighborhood were actors. The song used without permission was played in its entirety when I showed my movies to my English class.

21. A high school student used an opaque projector to enlarge a map from his younger brother's geography book to make a poster showing the location of Indian Reservations.

22. In a study about desert flora I made several transparency lifts from the magazine *Arizona*, showing pictures of the various kinds of desert flowers.

23. For a test, a teacher duplicated 30 copies of a page from a best-seller mystery so that students could underline descriptive words.

24. In Florida a teacher duplicated 30 copies of all the poems about snow she could find for an English class to read and discuss. Each student, in accordance with instructions, selected one poem which most made him feel the cold.

25. For our class Christmas party, I duplicated the words to several popular Christmas songs for the class to sing.

26. Students copied a poem about Thanksgiving from a newspaper and made a poster for the bulletin board.

27. A teacher enlarged an outlined map on the chalk board from a reference book with the use of an opaque projector to measure students' ability to name states, rivers, and capitals.

28. We used the opaque projector to enlarge and copy pictures on wallboard for the background of our play. The scenes were taken from original drawings in magazines and copyrighted books.

29. Students often make reports on tape. To make the tapes more attractive they use background music from records while making the tapes.

30. For a test on graphs and charts I duplicated examples of all kinds from various copyrighted sources, asking the students to explain and name each type.

31. I made slides from the pictures of the American flag in the Encyclopaedia Brittanica to show the changes in the American flag throughout the years and to discuss the reasons for the changes.

32. The physics and optics involved in the human eye are often difficult for students to comprehend. From a copyrighted photography book I duplicated charts of the optical system of a camera which is like that of a human eye, so students could understand the mechanism of the iris.

33. I let my first grade students cut out pictures from papers and magazines to illustrate the alphabet booklets they make.

20. My high school English thematic study for nine weeks was "Filmmaking." The home movie I made was acting out the story of a popular novelty song that was a silly melodrama. My brother and some kids in the neighborhood were actors. The song used without permission was played in its entirety when I showed my movies to my English class.

21. A high school student used an opaque projector to enlarge a map from his younger brother's geography book to make a poster showing the location of Indian Reservations.

22. In a study about desert flora I made several transparency lifts from the magazine *Arizona*, showing pictures of the various kinds of desert flowers.

23. For a test, a teacher duplicated 30 copies of a page from a best-seller mystery so that students could underline descriptive words.

24. In Florida a teacher duplicated 30 copies of all the poems about snow she could find for an English class to read and discuss. Each student, in accordance with instructions, selected one poem which most made him feel the cold.

25. For our class Christmas party, I duplicated the words to several popular Christmas songs for the class to sing.

26. Students copied a poem about Thanksgiving from a newspaper and made a poster for the bulletin board.

27. A teacher enlarged an outlined map on the chalk board from a reference book with the use of an opaque projector to measure students' ability to name states, rivers, and capitals.

28. We used the opaque projector to enlarge and copy pictures on wallboard for the background of our play. The scenes were taken from original drawings in magazines and copyrighted books.

29. Students often make reports on tape. To make the tapes more attractive they use background music from records while making the tapes.

30. For a test on graphs and charts I duplicated examples of all kinds from various copyrighted sources, asking the students to explain and name each type.

31. I made slides from the pictures of the American flag in the Encyclopaedia Brittanica to show the changes in the American flag throughout the years and to discuss the reasons for the changes.

32. The physics and optics involved in the human eye are often difficult for students to comprehend. From a copyrighted photography book I duplicated charts of the optical system of a camera which is like that of a human eye, so students could understand the mechanism of the iris.

33. I let my first grade students cut out pictures from papers and magazines to illustrate the alphabet booklets they make.

Answers to the preceding questions supplied by Dr. Harold E. Wigren.

1. Yes
2. Yes
3. Yes
4. No
5. No
6. No
7. Yes
8. Yes
9. Yes
10. Yes
11. No
12. No
13. No
14. No
15. No
16. No
17. No
18. No
19. Yes
20. No
21. Yes
22. Yes
23. Yes
24. No
25. Yes
26. Yes
27. Yes
28. Yes
29. Yes
30. No
31. No
32. No
33. Yes

LICENSES AND PERMISSIONS

by

Jerome K. Miller
Graduate School of Librarianship
University of Illinois
Champaign-Urbana, Illinois

and

Associate of INFORMATION FUTURES

LICENSES AND PERMISSIONS

Jerome K. Miller

Compulsory licenses for sound recordings were established in the 1909 copyright law. This is an extraordinarily complex topic which will be greatly simplified for the purpose of this paper. The author or creator of a work has a right to determine whether the work will be published. Having decided to publish it, the author or creator has a right to select the publisher and to control most aspects of its publication. Economic realities obviously impinge on these decisions, but the rights do remain. These rights are a bit more complex when they are applied to music. The composer has a right to withhold publication. Having published it (in sheet music), the composer has a right to withhold it from being recorded. If it is to be recorded, the composer may select the recording firm and control most aspects of its performance, distribution, etc. At this point the process changes. Once the composition has been legally recorded, the composer cannot prevent others from recording it. The composer also loses most of the artistic control he or she exercised over the original recording. The 1909 law also specified that the copyright owner had to be paid two cents for each copy of each part of a work that is recorded. A single record with one composition on each side generates two two-cent royalty fees. If 1,000 copies are made, they generate $40 in royalty fees. A recording containing five songs (the law calls them "parts") will generate ten cents (5 x 2¢) in royalty fees for each record. The manufacturer normally pays the fees to a performing rights society. The society retains a small part of the income to cover its expenses; the balance is distributed on a regularly scheduled basis to the composer. The composers and manufacturers may, and often do, negotiate lower fees. The 1976 copyright law makes one important change in this procedure. The compulsory licensing fee has been raised to two and three-fourths cents (2 3/4¢) per "work" in the record *or* one-half of one cent (.005¢) per minute, whichever is greater. Both the 1909 and the 1976 laws include detailed requirements for periodic royalty payments and for notice and registration procedures.

The 1976 law establishes compulsory licenses for jukeboxes, cable television, and nonprofit broadcasting stations. The jukebox industry was exempt by the 1909 law from royalty payments. The 1976 law stipulates that each jukebox must be registered with the Copyright Office and that an eight dollar per year royalty fee be paid for each unit. The fees will be paid to the Copyright Office. After deducting a small amount to cover expenses, the Copyright Office will distribute the balance to the copyright owners. The distribution will be determined by the Copyright Royalty Tribunal, on the basis of claims filed by the copyright owners. The operators of cable television (CATV) systems will also begin paying royalty fees. The fees will be based on a complicated schedule determined by the gross annual receipts of the system and the number of local and distant signals they transmit. Congress urged the copyright owners and the operators of the educational broadcasting stations to develop a voluntary annual licensing fee schedule. If they fail to arrive at an agreement, the Copyright Royalty Tribunal will establish a compulsory fee schedule.

Voluntary licenses are very common and come in a great variety of forms. They are, essentially, a contract conferring part of the copyright owner's bundle of rights to a licensee. Licenses may be exclusive or non-exclusive. A curriculum developer might sell an exclusive license to a film vompany to produce and sell the film designed for used with a new curriculum. Since it is an exclusive license, the developer could not sell the same rights to another party. Non-exclusive licenses are more commonly found in schools. A school district wanting to videotape or transmit films obtains a non-exclusive license for that function for the copyright owner. Since it is non-exclusive, the copyright owner may sell similar licenses to other schools. Media production centers may obtain annual "blanket licenses" for the music they use in sound tracks. The license pays for the music they record during the year of the contract. Once a master copy is recorded under contract, the copies may be reused endlessly. Licenses can be written for almost any length of time, but they are commonly written for one year, with an automatic renewal feature for subsequent one-year periods. Because of the anti-trust laws, no two firms offer the same license terms. Efforts by educational association to develop a standard license have not met with success.

One-time permissions are widely used in the publishing industry. They are a contract for a single use (single application) of all or part of a

copyrighted work. When a publisher wants to publish an anthology of poetry, he or she must obtain a one-time permission from the copyright owner to reprint each poem. The one-time permission may be granted free of charge, or, more often, it is sold for a fee. It may be a flat fee for the use, or it may be established on a sliding scale based on the number of copies that are sold. Filmstrip producers purchase one-time permissions to reproduce some or all of the photographs in their filmstrips. Media production centers obtain one-time permissions for the music used in sound tracks. This is often called a "needle-drop" charge. A fee of twenty-five or more dollars is paid for each musical segment in the sound track. The needle-drop fee is a one-time expense in the production of a film or other program. Needle-drop fee agreements frequently exclude the use of the material on television. If the film or other program is to be televised, an additional one-time television right must be acquired.

In recent years, educators and publishers have been concerned about the duplication of copyrighted materials by school personnel. Some of this copying is a fair use of the materials. Some copying, especially repeated uses, exceeds the reasonable limits of fair use. Procedures have been developed to help educators obtain one-time permission to make the copies. In 1975, the Association of American Publishers issued a pamphlet, "Permission to Copy," explaining the process. The pamphlet contains a simple form for requesting one-time permission to duplicate printed materials for school use. This one-time permission request form was tested in the author's dissertation study; it proved to be reasonably satisfactory in obtaining permission to duplicate printed materials for school use. An almost identical form has been prepared by the Association of Media Producers (AMP) and the Association for Educational Communications and Technology (AECT). The AMP-AECT form will be released in the spring of 1977. The following suggestions are offered to expedite obtaining one-time permissions for school use:

1. Use forms issued by professional and trade associations.
2. Identify the institution where the copies will be used.
3. Identify by name and title the person making the request.
4. Identify those who will use the copies and how they will be used.
5. Leave a four-inch margin at the bottom of the form for the publishers to stamp or write a permission statement.

6. Give a complete bibliographic citation to the work to be copied.
7. Identify the material (pages, frames, etc.) to be copied.
8. Identify the number of copies to be made and the method of duplication.
9. Allow four weeks for a reply. (Most replies arrive in about two weeks.)
10. Send a stamped, addressed return envelope.
11. When asking permission to copy from a book, send photocopies of the pages to shorten the publisher's searching time.
12. Advise, when appropriate, that the copies will be distributed free of charge.
13. Advise, when appropriate, that the copies will only be used one time.

Purchase contract conditions may also be used to obtain certain rights to use or duplicate copyrighted materials. A purchase order may include a clause granting the purchaser the right to make a certain number of copies of the item being purchased. It also may be used to obtain certain additional uses of copyrighted works. A school might purchase 16mm films, on condition that the vendor agree to permit the school to transmit the film through a closed-circuit television system. Readers should consult their school attorney before employing this technique.

NOTES

Copies of the pamphlet "Permission to Copy" are available free of charge from:

The Association of American Publishers, Inc.
1920 "L" St., N.W., Suite 750
Washington, DC 20036

Sources of blanket licenses and one-time permissions for sound track music:

The best listing of these firms is found in the "Music and Sound Effects Libraries" section of the *Audiovisual Market Place, A Multimedia Guide* (New York: Bowker, annual).

Some of these firms may be identified in the "Motion Picture Film Music Scoring" section of the yellow pages of the New York telephone directory.

Sound effects and background music recordings are also available from record stores and wholesale record dealers. They are frequently available only through special orders. Currently available titles are listed in the "Spoken and Miscellaneous" section of *Schwann 2, Record and Tape Guide: Semi-annual Supplement to the Monthly Schwann 1.* These recordings are produced for the home market and there is no assurance that a media center can acquire permission to duplicate them. The *Schwann* catalogs are found in record shops and music libraries.

PROPOSED GUIDELINES FOR OFF-AIR COPYING OF

COMMERCIAL TELEVISION PROGRAMS

this document was developed on the closing day of the *Copyright and the Teaching/ Learning Process* conference by a group of conference participants

PROPOSED GUIDELINES FOR OFF-AIR COPYING OF COMMERCIAL TELEVISION PROGRAMS

Participants of *Copyright and the Teaching/Learning Process* conference

Introduction

The new copyright law includes criteria for fair use copying of copyrighted materials for classroom use. Guidelines for the interpretation of the fair use criteria are available for a number of school situations. Guidelines are lacking, however, for the application of fair use to off-air copying of commercial television programs. It is important that educators have a set of guidelines for this difficult aspect of fair use copying. It is imperative, then, that the representatives of educational associations enter into negotiations with the commercial television networks and the owners of other copyrighted television programs for the purpose of developing suitable voluntary guidelines.

With the increased capability for off-air rerecording of educationally useful television programs for replay at times convenient to classroom scheduling, it is important to school systems that public and instructional programs be available for classroom playback, closed circuit display, and other school exhibition modes contemporaneously with local station broadcast. Content copyright and other legal limitations, however, often demand that the use of such program rerecordings be controlled in a manner consistent with original television broadcast authorization.

The Rationale for Copying

Many television programs broadcast during the evening and weekend hours (especially the documentary programs) have great value as teaching tools. For a teacher to make an effective use of these programs, the programs must be shown in the classroom during the regularly scheduled period of instruction. These suggested guidelines are designed to facilitate the rescheduling of these evening and weekend programs into class periods in not-for-profit schools.

INFORMATION FUTURES
1977

The Guidelines

1. All copying of commercial television programs (or program segments) must be done on the basis of a request for the program (or program segment) by a teacher.

2. School rerecordings may be made only by students, teachers, and faculty or staff members in an accredited non-profit educational institution.

3. School rerecordings will be used solely for classroom, auditorium, or laboratory exhibition in the course of classroom instruction or related educational activities.

4. No more than one copy of the program may be made.

5. School rerecordings will be used only in the educational institution for which made, and will not be given away, loaned, or otherwise made available outside that educational institution.

6. The copy must be erased within seven days of the time it was recorded.

7. The copy may be shown in face-to-face teaching and through closed-circuit transmission.

8. The copy may only be used in the school district, or on the college campus, where it was recorded.

COPYRIGHT AND PROFESSIONAL ETHICS

by

John A. Davis
AV Instructional Media Services
Washington State University
Pullman, Washington

and

Associate of INFORMATION FUTURES

COPYRIGHT AND PROFESSIONAL ETHICS

John A. Davis

It is said that during the First World War, there were times when it became necessary to send troops into combat before they had adequately learned the arts of war.

Two educational statisticians were shipped to the front lines. They happened to be together in a front trench when they observed an enemy helmet peering from behind a rock. The first statistician took his rifle and fired, and the bullet went about a foot to the left of the helmet. The other statistician then aimed his rifle and fired, and the bullet went about a foot to the right of the helmet. Overjoyed, they threw down their rifles, embraced each other, and exclaimed, "We got him!"

On the average--we have a new copyright law. We have discovered that there are some guidelines for educators' "fair use" of print materials (although of course they are going to have to be tested), and there aren't yet guidelines for non-print. And most of us here are concerned with non-print. About a foot to the left, we've heard Harold Wigren's rather positive and optimistic observations (at least he started that way; as things have proceeded, I think he's become more conservative). About a foot to the right, Jim Popham gave us the conservative view from the National Association of Broadcasters (and he has since begun to moderate a bit to the left). But we are far away from hitting that helmet.

Some Ethical Injunctions

Where is it that the audience comes from in this group of three dozen people from twenty states, representing both producers and consumers in every level of education? I thought it might be interesting to review a few things about where you *may* be coming from, not geographically, but in terms of philosophies and professional commitments.

There is a line in the Code of Professional Ethics of the National Education Association. Principle number one, item two of that Code, states, "In fulfilling his obligation to the student, the educator shall

not deliberately suppress or distort subject matter for which he bears responsibility." It also says, he "shall not without just cause, deny the student access to varying points of view."

The Code of Professional Ethics for the Association for Educational Communications and Technology states, "In fulfilling obligations to the individual [that is, the individual learner], the member shall provide access to varying points of view," and "shall protect the individual's rights of access to materials of varying point of view." However, the section of the AECT Code addressing commitment to the profession stipulates that members "shall inform users of the stipulations and interpretations of the copyright law and other laws affecting the profession and encourage compliance." That represents the point of view that one obligation of the educator is to show respect for the law. Provide access to all the information you can *within* the law.

The California Library Association recently published a draft statement of professional responsibility. The Preamble includes these statements: "It is . . . the right of each individual to have uncensored access to unaltered information of both a serious and frivolous nature." "It would be unethical for a librarian to establish the information which led to a personal, moral, political or aesthetic belief, or that belief itself, as the total available information" if the librarian did not actually make available the *total* information. And here's a statement under the heading "Ethical Considerations" that I think expresses the philosophical and professional commitment of educators (and I include librarians in that category). "The overriding thrust of a librarian's professional activities is to make information accessible to users; *an activity is ethical insofar as it contributes to this end, it is unethical and unprofessional insofar as it detracts from this goal*" [italics mine].

That rather strong language, I think, aptly describes the kind of ethical considerations most of us bring to a conference like this.

The New Copyright Dilemma

The educator's copyright dilemma as I see it now is not very much different from what has been sketched out for us over the last half-dozen years. The choices seem to be that the educator may continue to pursue customary practice--which means continue to do those things we are now *assured* are illegal, or you may decide to risk civil disobedience (which

has the possible benefit of raising the educational level of prisons), or you may decide that the safest legal approach is to teach only from the bought textbook, ask the questions that are in the back of the book, then go home. If "civil disobedience" of the copyright law is not acceptable to you, and the safely legal approach is also unacceptable, you might choose to leave the profession.

To me those are equally unacceptable extremes. Because what we are *all* about--authors, publishers, producers, educators--what we are all about is helping to create a society that can cope with an information-rich environment. That is the way I describe it--I would call our present societal environment *information-rich*. We frequently suffer from information *glut*. So much comes at us so fast, that we must find ways to order it, to abstract, to prioritize, to discover how to use and how to relate and how to evaluate and how to react to this information. And it just is quite logical that one can't learn how to handle information without *using* plenty of information.

Another Approach

The Oxford Universal Dictionary includes in its definitions of ethics, "The science of human duty in its widest extent." What seems to me to be *ethical* in this new copyright situation has been suggested by a number of the speakers this morning--that we begin to examine not simply the do's and don'ts, but the *options*, the alternative ways we might approach the problem. When I ask someone what I can do and am told what I *can't* do, that doesn't meet my needs either as an educator or as a learner; I need to know also what I *can* do.

Look Again, What Did You Miss?

Sometimes additional information is helpful. Try looking at a situation to discover what really happened rather than what you *assume* happened. We have a colleague who, a number of years ago, faced a tight-money situation in his school district. In this instance the film budget for the district's schools was hurting. Their solution was to distribute the films to the schools via closed-circuit television (this was fifteen years ago). The assumption was that distributing at least the most frequently requested films by CCTV would take the pressure off those films. Guess which films, then, teachers requested more! Those same films!

A teacher would see the film on television and think, "Hey, that would be great to use for such-and-such." To the district's frustration, there was actually a substantial increase in the number of requests for those particular films. That is one of those little nuances that may be lost when we speculate about the evils of off-the-air videotaping.

A Model Attitude

I think that an interesting model can be seen in the relationship between audiovisual dealers and audiovisual users. Most of us here--if you're running a program, if you're in a school or a district, or if you're in a college or university--you know about the relationship with audiovisual dealers. The equipment folk. (You software folks are off the hook now, but I want you to hear the analogy that I'm talking about.) We and the equipment dealers are about common ends. We know that we can't do our jobs without help from the dealers, and they know that they need us as customers. So I get a visit from my local AV equipment dealer--and in our part of the country he isn't all that local; it's a *trip* for him! He comes down and shows us some item that he has, and together we examine it in some detail. We give him the benefit of an analysis based upon our experience of what uses this item may have or what may go wrong with it. He gives us the benefit of what he has learned from the manufacturer, and what he's learned from other customers he has visited. He may even leave it with us to try out.

When it is time to buy the item, we will try to write the purchase specifications to be fair to the dealer as well as to ourselves. We hate to have a dealer go to particular trouble to accommodate our needs, and then have the purchase order go to some fellow operating out of the basement of a home in another state. We try to help our equipment dealer as he helps us; it is a matter of mutual recognition of our goals and, I think, of mutual respect.

Something We Can Do

Before the sessions started, several people said, "Well, I hope we get the answers." My response, which may have sounded facetious, was, "I hope we get the right questions." I think that's what has begun to evolve over the space of the 1-st day and a half. The right questions are starting

to come up. And I've heard expressed here the feeling that maybe we *ought* to respond positively as Gene Aleinikoff said--get pen in hand and *write* to Barbara Ringer, get pen in hand and write to your congressman, and *communicate*. If we are *communicators* then we ought to be *communicating*.

I do feel a growing confidence that we are not going to "go macho"--that we're not going to see the probability of a militant civil disobedience countered by a militant closing down of a school district forced to pay a half-million dollar copyright infringement settlement. I hope that isn't what heppens because to me *that* would be *unethical*.

A Common Concern

I think that we are about common ends, I think there are alternatives for reaching those ends, and a number of them are beginning to come to light. Let's communicate with each other and with the people in decision-making roles. Several you you, knowing that I was scheduled to talk about something called "professional ethics and copyright," said, "I do hope that you are going to stress how important it is for us to go back and help our teachers and users to understand what they are supposed to be doing and not supposed to be doing, and what they are supposed to be asking and *not* asking of us." Certainly I agree that we should not encourage users to encourage *us* to break the law. But as we approach the problems of educators' access to copyrighted materials, as we approach those problems with the people who are going to be making these policy decisions, let's try to frame our responses in terms of the *common goals* wb have--to provide access to the materials that are necessary to help people learn as they *must* learn, to stay free in a free society.

CONFERENCE SUMMARY

bu

Jerome K. Miller
Graduate School of Librarianship
University of Illinois
Champaign-Urbana, Illinos

and

Associate of INFORMATION FUTURES

CONFERENCE SUMMARY

Jerome K. Miller

The conference began with Mr. Miller's overview of the history of copyright development in Europe and America. The subject is traced in the first paper in this book and will not be repeated here. Mr. Aleinikoff then described the new copyright law. The 1909 copyright law was vague on a number of things and each interest attempted to use the vagueness to its own advantage. There was tremendous pressure on Congress during the period the revision bill was under study. Most pressure groups clung to a rigid adherence to the status quo. Congress found itself in the center of a many-sided controversy. It saw itself as a mediator attempting to resolve many conflicts among differing points of view. The new law reflects this compromising effort. It eliminated many of the vague areas in the law. It is now a precise law designed to accommodate modern society and modern communication systems. The new law eliminates the old two-pronged system of copyright protection which depended on federal statutes for published materials and common law for unpublished works. Placing all copyright regulation under the federal law eliminates a major source of confusion between international law and federal law, between international law and common law, and among federal, state, and common law.

Another important departure from the past is the recognition of users' rights in copyrighted materials. The fair use and library photocopying sections of the law establish special rights for educators, librarians, churches and synagogues, agricultural fairs, the blind, and the hearing impaired.

Unlike the old law, the new law provides copyright protection for a work the moment a tangible copy of the work is created. An author's handwritten or typed manuscript receives copyright protection from the moment the ink is deposited on the paper. The copyright in a television program commences the moment the electronic signals are recorded on the tape. If a work is not fixed in a tangible form, it is not subject to federal copyright protection. (It should be noted that some protection is available for evanescent works. A live television program which is not recorded in a tangible copy may be protected under state laws.)

The creator of this tangible copy is automatically granted complete and exclusive rights to the work. The 1909 law contained a long list of enumerated rights and restrictions. Section 106 of the 1976 law lists four broad exclusive rights:

1. To reproduce the work.
2. To prepare derivative works.
3. To distribute the copies or phonorecords by sale or other transfer of ownership, or by rental, lease, or lending.
4. To publicly perform literary, musical, dramatic, choreographic, pantomime, pictorial, graphic, and sculptural works, including individual images of a motion picture or other audiovisual work.

The law contains a number of limitations and exceptions. The government cannot copyright original government publications. However, works made under government grant or contract may be copyrighted. The copyright is usually given for a very short period. The copyrights in government-sponsored works can be assigned to the government.

One of the most frequently discussed sections of the law is Section 107, the fair use section. This section incorporates the four judicially developed criteria for fair use:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.
2. The nature of the copyrighted work.
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole.
4. The effect of the use upon the potential market for or value of the copyrighted work.

The application of the fair use concept to libraries is contained in a separate section. Section 198 gives libraries the right to:

1. Reproduce an unpublished work in facsimile form solely for purposes of preservation and security or for deposit for research use in another library or archive.
2. Reproduce a published work in facsimile form solely for the purpose of replacement of a copy that is damaged, deteriorating, lost, or stolen, if after a reasonable effort, an unused replacement cannot be obtained at a fair price.
3. Reproduce a single copy of no more than one article or other contribution of a copyrighted collection or periodical issue or a copy of a small part of any other copyrighted work, if the copy is intended for the personal use of the individual and if the library displays a proper fair use notice.

4. Reproduce an out-of-print work if a copy cannot be obtained at a fair price. The copy must become the property of the user.

5. Reproduce "audiovisual news programs," which are understood to mean (a) regularly scheduled radio and television news programs, (b) interviews concerning current news, and (c) live news broadcasts.

6. Furthermore, libraries are not responsible for unsupervised copying by patrons, if the machine displays a copyright warning notice.

The limitations of reproducing single copies of small parts of works for interlibrary loan were clarified through guidelines issued by the National Commission on the New Technological Uses of Copyrighted Works (CONTU). A library may, in any calendar year, receive up to five copies of articles published in a journal within the past five years. In addition, a library may, in any calendar year, receive up to five copies of parts of a copyrighted book. Unlike the section on journals, these restrictions apply during the entire duration of the copyright in the book.

Section 110 enumerated exemptions for certain performances and displays. It permits:

1. The performance or display of a work by instructors or pupils in the course of face-to-face teaching in nonprofit schools. Mr. Aleinikoff, with the concurrence of Mr. Bender, indicated that this included closed-circuit transmission of audiovisual programs within a school building for the purposes of assisting face-to-face teaching. It does not apply to CCTV transmissions between school buildings.

2. The transmission of nondramatic literary or musical works by instructional television (ITV) stations, for the purpose of transmission to (a) classrooms and other places of instruction, and to (b) persons who cannot attend classes because of disabilities or other special circumstances which prevent them from attending classes.

3. Performance or display of certain works in religious services.

4. Performance of nondramatic literary or musical works (except transmissions) given without payment to the performers or without commercial advantage if the proceeds, less reasonable costs, are used for educational, religious, or charitable purposes.

5. Reception of radio and television programs in stores and restaurants if there is no direct charge to hear or see the programs.

6. Performance of nondramatic musical works at nonprofit agricultural or horticultural fairs.

7. Performance of nondramatic musical works in retail record stores for the purpose of promoting the sale of recordings.

8. Transmission of nondramatic literary works by educational broadcasting stations, radio subcarriers, or cable systems when the performance is primarily directed to blind and deaf persons.

9. Single performances of dramatic literary works published ten or more years before the performance, when the performance is primarily directed to the blind. The performance must be made without commercial advantage and transmitted through a radio subcarrier.

Section 111 establisheds royalty payments for cable television systems (CATV) for the secondary transmission of distant signals. The fees are based on the firm's gross receipts and the number of distant signals transmitted. Cable systems in hotels and apartments, instructional television cable systems (CCTV), and nonprofit translators are exempt from paying the fees.

Section 118 establishes compulsory licenses for noncommercial (educational) radio and television stations for the use of nondramatic musical works and published pictorial, graphic and sculptural works. Congress urged the proprietors and the broadcasters to develop mutually agreeable licensing agreements. If they are unable to arrive at voluntary agreements, the Copyright Royalty Tribunal is required to establish a mandatory licensing fee schedule. Nondramatic literary works are not included in the compulsory licenses. The proprietors and the broadcasters are expected to develop voluntary agreements covering these materials.

Mr. Bender explained the publishers' and media producers' views on copyright. They have a substantial investment in the materials they develop. They are anxious to have them used, but they need to be fairly compensated to recover their costs, to make a small profit, and to generate capital for future publications and productions. A small amount of copying in excess of fair use, when repeated many times, can be very damaging to them. Most instructional materials have a very "thin" market. A best selling film sells less than 100 prints per year, worldwide. The loss of a few sales, rentals, or licenses can have a substantial effect on the profitability of that title.

He then addressed the question of suing educators who infringe copyright. Most firms have had opportunities to file complaints against notorious infringers, but they have delayed doing so until the new law goes into effect. He suggested that some suits will be instituted in the near future. Mr. Bender suggested that this was really not the best way to handle infringements; educating users to their responsibilities is preferable to suits.

Mr. Bender then discussed the problem of granting educators the right to videotape commercial television programs off-the-air. First, broadcasters don't own most of the programs they broadcast. They only own the news programs; most of the rest are obtained from independent producers. The independent producers are not interested in granting rights to educators, since it would complicate their contract negotiations with the musicians, performers, directors, etc. The performers unions are not willing to grant secondary rights. The music publishers and the Directors Guild of America are equally unwilling to grant these secondary rights. Some licensors, such as BBC, will not license the use of their programs if the American distributor allows others to copy the programs. Mr. Bender acknowledged that some fair use does apply to off-air copying. It is hard to know how it is to be handled, though. It is difficult for schools to edit programs and it is difficult to copy a small segment of a broadcast without copying the program in its entirety. The Register of Copyrights will soon call meetings of the interested parties in an attempt to work out a solution to the problem. In the meantime, it should be noted that almost all documentary programs are licensed for 16mm film distribution. They are not hard news, and they do not fall within the off-air copying exemption in Section 108 of the new law.

He then spoke of the process of obtaining permission from publishers and producers to duplicate a portion of a work. There are two reasons permission is denied. In some instances, the nature or amount of the copying duplicates a sale or license. In other instances, publishers and producers do not hold the rights to the material in question, so they cannot give others the right to use it. This is an acute problem among educational media producers. Until a few years ago, they obtained permission for their own use of a set of pictures or a film sequence without obtaining the right to permit others to use it. Many, but not all, firms now obtain full rights to the materials they distribute. This enables them to respond to educators' requests to use the materials.

Next the question of remounting filmstrips into slide frames was addressed by Mr. Bender. As long as this is done for the purpose of adapting the program to a more convenient storage or display format, it is acceptable. (Editor's Note: This differs from most situations where audiovisual materials are converted to a different format. Converting filmstrips to slide format does not involve copying. If copying were

involved, it would probably be necessary to seek permission.) It would not be acceptable, beyond fair use copying, to adapt the materials into another program without permission. To do so creates a derivative work. If the producer's point of view is changed by the adaptation, then it is unfair to the producer.

He also pointed out that Section 108(c) only permits the duplication of audiovisual materials for the purpose of replacing lost, stolen, damaged, or deteriorating materials that are not available on the market at a fair price. (Editor's Note: Section 108(h) specifically prohibits copying musical works, motion pictures, and audiovisual works, with the exception of audiovisual news programs.)

Mr. Popham spoke of the commercial networks' problem with granting educators the right to duplicate programs. He explained that the programs broadcast by commercial stations fall into three groups:

1. Network programs:
   - Network produced programs, chiefly news, documentaries, and public affairs programs
   - Independently produced programs, chiefly entertainment programs.
2. Syndicated programs:
   - Reruns of older network programs.
   - New programs not handled by the networks.
3. Locally produced programs, chiefly the local news and public affairs programs.

The networks can license the use of the documentary, news, and public affairs programs they produce, but they cannot permit or license the use of the programs they obtain from the independent producers. Most stations are quite generous in permitting the schools to copy, perform, or transmit their own programs. Indeed, many locally produced programs are not copyrighted.

Mr. Popham followed up on earlier remarks that copyright only applies to tangible copies. All the independently produced and syndicated programs are copied prior to transmission. The networks' own programs, especially the news, are often recorded simultaneously with the "live" broadcast. This meets the tangible copy requirements for copyright protection. He further reminded the participants that many television programs are protected by two levels of copyright. The programs are copyrighted, as are the underlying literary, musical, graphic, and dramatic works. A lack of a copyright notice in a program does not necessarily mean that the

program is not copyrighted. Under the new law, a valid notice is not necessary to copyright protection.

Under these circumstances, he likened off-air-copying to a mine field. The educator who videotapes commercial television programs is in great danger of copyright infringement. The only exceptions are (1) videotaping under the provisions of Section 108(f)(3), and (2) videotaping small segments of programs under the provisions of Section 107. He suggested that copying up to three minutes of most programs *might* be fair use.

Mr. Aleinikoff spoke of the seven-day convenience copying agreement developed for public television. It was prompted by three factors. First, educators wanted permission to copy instructional programs to be able to reschedule them into times in the school day when they could be used effectively. Second, public television stations have a right to show the programs as many times as they like during a seven-day period. Finally, if they prohibited all copying, it would be hard to persuade schools to honor their copyrights. He likened this to a safety valve. Seven-day convenience copying has not resolved all of the problems. Some vendors fear the copying privilege will encourage the copying of uncleared programs. This is a special concern for educational film companies who license films for ITV transmission. The instructional television stations also complain that this deprives them of leverage in getting school districts to support the stations. Whatever its problems, the seven-day convenience copying agreement marks substantial progress in resolving the off-air-copying question.

Mr. Wigren categorized his reaction to the new copyright law as "Joy, relief, ho-hum, so what, dismay, frustration, and anger." Although there are some guidelines and some safeguards for teachers and scholars, the law is clearly weighted in favor of the copyright proprietors. The publishers accomplished wonders in extending the duration of copyright, more for the benefit of the heirs than the authors. The new law does away with the public broadcasting exemptions. It revokes the exemptions for jukeboxes and cable television and affords further protection for the manufacturers of recordings. Statutory damages for infringements were increased, up to $50,000 in some cases, plus court costs and attorney's fees.

On the other hand, fair use is now statutory. It clearly covers making single copies of articles for use by a teacher and making multiple copies for class distribution. This application must be judged by three criteria: brevity, spontaneity, and cumulative effect. They apply only to printed materials. The law distinguishes between commercial and non-commercial uses. It also shifts the burden of proof of guilt in infringement from the teacher to the proprietor.

A question was raised: is it fair use for a library to make multiple copies of a journal article and place them on reserve for class use? After some discussion, the panel determined that it would be fair use to make multiple copies of an article and place them on reserve as a substitute for making multiple copies for class distribution. The criteria of brevity, spontaneity, and cumulative effect must be met in each instance. The criteria apply to the instructor making the request, not to the library.

Mr. Miller opened the sessions on permissions and licenses with a brief review of these forms. His address was a condensation of his paper included in this work. Mr. Bender spoke of the development of licenses granting schools permission to videotape and broadcast motion picture films. Because of the anti-trust laws, no two firms have the same license arrangements. Some copying licenses are based on the number of monitors or playback machines in the schools. Others are based on the average attendance (ADA) at the school or on the number of copies made. In the case of films broadcast by an ITV station or network, the fee is based on the size of the viewing audience and on whether the licensee owns a copy of the film. A license may, for an additional fee, include duplication rights for the schools affiliated with the ITV station or network. Mr. Bender also mentioned that some intermediate school districts and Boards of Cooperative Educational Services (BOCES) have acquired duplication and transmission rights for films through purchase conditions incorporated in volume purchasing agreements.

He then spoke of the development of clearinghouses to expedite permission for duplication, transmission, display, or performance of educational materials. A clearinghouse means different things to different people. It can expedite permission, collect fees, and distribute the fees to the owners. It might be similar to ASCAP and BMI. There is one major difference, though: music is covered by compulsory licenses whereas educational materials would be covered by voluntary licenses. A clearinghouse

of this nature has one great advantage: if the material the educator wants is handled by the clearinghouse, and if the owner of the material is in a position to grant the desired permission, it could give educators a quick response to their requests. A clearinghouse could be used to grant permission to tape commercial television programs off-the-air. If it were in operation, it would offer a safety valve. When permission is not available, it creates a strong temptation to violate copyright.

Mr. Popham began his presentation on licenses by explaining that commercial radio and television stations purchase licenses for the performance of the music in their programs. They cannot give this right to others. He went on to explain the procedures for obtaining permission to duplicate television programs. One of the greatest problems is identifying the person or agency who controls the rights. The producers of television programs are identified in the credits in a program. Local stations can frequently identify program sources. The Motion Picture Association of America, 522 Fifth Ave., New York, NY 10036, can also assist in identifying and locating producers. The annual *Television Factbook* and the *Broadcasting Yearbook* identify radio and television producers and provide their addresses. These books are found in large libraries and broadcast stations.

Educators may obtain licenses from CBS to dupliate the "CBS Morning News," the "CBS Evening News," the "CBS Midday News," the "CBS Sunday Night News," and CBS coverage of political conventions, news conferences and government hearings. (Editor's Note: Government hearings are probably in the public domain.) The licenses are offered to individual schools for $25 per year. The annual fee for school districts is based on the number of students enrolled. The largest fee is $500 for a district having over 500,000 students. Colleges and universities are charged $100 per year. Recordings made under these licenses are limited to in-school, non-broadcast use. They do not cover programs produced by network-owned stations. They must be erased after thirty days; the use may be extended upon request. Recordings made under these licenses may not be edited, except to delete commercials. CBS documentary programs, including some segments from "60 Minutes," can only be obtained from film companies, such as Films, Inc. and Contemporary-McGraw Hill, which have licenses to distribute them in film format. (Editor's Note: CBS sells film distribution rights to a number of firms. Educators who have difficulty

locating a film version of a documentary program may write to CBS for assistance in identifying the title and the distributor. If the program was not licensed for film distribution, CBS will make a film copy of the program for the school.) Requests for information may be obtained from:

Mr. Joseph P. Bellen
Vice President for Research and Development
CBS News
524 West 52nd St.
New York, NY 10019

NBC offers school licenses for certain programs. Information may be obtained from:

NBC Off-air Licensing Program
National Broadcasting Co.
30 Rockefeller Plaza
New York, NY 10020

ABC does not have a formal licensing program, but information may be obtained from:

Ms. Donna Sessa
Manager of Educational Licenses
ABC Merchandising
ABC Broadcasting Co., Inc.
1330 Avenue of the Americas
New York, NY 10019

Mr. Wigren expressed a number of reasons for his opposition to clearinghouses for educational materials:

1. They have a tendency to erode the educator's right to fair use.
2. Participation is not mandatory for all copyright owners.
3. Once established, the fees would escalate.
4. They would prove to be hard to administer, and would lead to "administrivia," a burgeoning of bureaucratic paperwork.
5. There would be a lack of uniformity in the application of the licenses.
6. The controlling board would probably exclude an effective level of user control.

Mr. Wigren insists that licenses must only apply to uses in excess of fair use. They must be mandatory for all producers and must include all educational materials. The licensing or permissions process must be as free as possible from red tape. He suggested that we wait five years to see how the new law works before establishing a clearinghouse. His position was based, in part, on a fear that large conglomerates might gain control of the system and might begin dictating the terms for the licenses.

Mr. Aleinikoff discussed the educator's need to tape-delay both commercial and public television programming for the purpose of scheduling a program into a class period when it is needed. He contended that the commercial networks are licensed to make a profit from the public airways; it is not too much to ask for the right to tape-delay programs for that purpose, without a fee payment. He also opposed attaching a copying license to each videotape recording machine or each blank videotape. Different people use them for different purposes. Some duplicate copyrighted materials and others do not. He also expressed a concern about the firms that refuse to grant permission or sell licenses for educational use of their materials. He supported the earlier statement about the need for a safety valve as an alternative to illegal copying.

Mr. Popham said the networks were strongly opposed to any form of compulsory licensing for news programming. They are already more closely regulated than the newspapers. A participant asked for a reaction to the concept of seven-day convenience recording of news and documentary programs as a form of fair use. Mr. Popham and Mr. Bender expressed disagreement with the idea. All but one of the educators present favored the concept. Mr. Miller suggested that tape-delaying programs for class use falls within the same logic as the tape-delaying of programs by local stations. Mr. Popham did not agree; local stations are permitted to tape-delay programs under their contracts with the networks. Mr. Miller presented a group proposal for seven-day convenience recording of commercial television programs as a form of fair use. (The proposal is included in this book.) Mr. Popham and Mr. Bender commented that fair use applies more broadly for news programs than for documentary programs and more broadly for documentary programs than for entertainment programs. The problem with copying entertainment programs is that the programs will be re-broadcast at a later date and the copying may replace a sale or license. Once the door is opened to off-air copying, the networks and producers fear that it would be infintely more difficult to police the copying. Mr. Bender added a comment that off-air-copying might interfere with the syndication of programs to local stations. The profit in television entertainment programming is not in the original network broadcast; the producer does not profit from a program until it enters syndication (i.e., the reruns).

A question was raised about obtaining permission to duplicate materials by means of a telephone request. Mr. Bender cautioned that it is very important to have written documentation of permission obtained from a copyright owner. Mr. Miller pointed out that the statute of limitation for civil and criminal offenses, in the old and the new law, is three years. Mr. Popham commented that it would be important to retain all permissions records for three years after the *last* use of the material for which permission was obtained.

Mr. Brong closed the conference by commenting that copyright is complex. The producers have materials they want educators to use. It is a small market, though, and they are dependent upon educators not infringing their copyrights. Educators are also dependent upon the producers for most educational materials they use. The two groups are, in fact, interdependent. "Media technology permits us to walk on thin ice. We don't know if we will fall through the ice, and if we do, we don't know what the water will be like. The water is murky." He then commented on a remark Mr. Bender made. Educators sometimes confuse themselves. Instead of knowing and using the copyright law, we go down a garden path based on what is supposed to be a moral or ethical right, unrelated to the law. It is important that decisions be based on the law and not on suppositions about ethical or moral rights.

The most heated discussions during the conference concerned off-air copying. Mr. Brong commented that the broadcasters interpret the copyright law differently than Congress intended. He also commented that educators' rights under the First Amendment appear to be in conflict with the rights of the news organizations.

In closing, he urged the participants to develop an understanding of the law and to communicate it to colleagues. It should be applied in the services we administer. If educators try to observe the law and it doesn't work out, there are routines we can follow to change the law.

A BRIEF BILIOGRAPHY

by

Jerome K. Miller
Graduate School of Librarianship
University of Illinois
Champaign-Urbana, Illinois

and

Associate of INFORMATION FUTURES

To understand the law, one needs a copy of the law and its official interpretation:

The Copyright Act . . . . . Public Law 94-553

The House Report . . . . . Report No. 94-1476

The Senate Report . . . . . Report No. 94-473

The Conference Report . . . Report No. 94-1773

An errata sheet to the House Report in the *Congressional Record--House*, September 21, 1976, pp. H 10727-H 10728

These documents have been rearranged for convenient access in:

Copyright Revision Act of 1976: Law, Explanation, Committee Reports (Chicago, Ill.: Commerce Clearinghouse, 4025 West Peterson Ave.), $12.50.

Other useful works are:

Copyright and Educational Media: A Guide to Fair Use and Permissions Procedures (Washington, D.C.: Associati/n for Educational Communications and Technology, 1977), $3.95 ($2.95 to AECT members).

Copyright: New Law, New Directions (sound filmstrip) (Washington, D.C.: Association for Educational Communications and Technology, 1977), $22.95 ($18.95 to AECT members).

"Librarian's Guide to the New Copyright Law" (American Library Association), *Washington Newsletter* 28 (November 15, 1976). The entire issue was devoted to copyright.